IN THE

Supreme Court of the United States.

OCTOBER TERM, 1909.

FRANK H. WASKEY, JOSEPH M. CRABTREE, J. POTTER WHITREN, AND ANDREW EADIE, *Petitioners,*

vs.

JOSEPH HAMMER, OTTO HALLA, AND B. SCHWARZ, *Respondents.*

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

In our principal brief, filed in support of the petition for writ of certiorari, we endeavored to show, among other things, that the Circuit Court of Appeals exceeded its jurisdiction

1. In declaring the location of a mining claim by the mineral surveyor void,

2. In imposing other than a statutory penalty.

That these points are well taken is abundantly shown by the decisions cited in support thereof, but supplementary thereto we wish to call attention to the practice of the De-

partment of the Interior with respect to cases wherein citizens have made entries of public lands and afterwards, but before perfecting title, have become "officers, clerks and [or] employees of the General Land Office."

The practice has always been to permit such entries to be perfected, notwithstanding the entrymen were then in the Government service and employed in the General Land Office.

The case of Winans vs. Beidler, 15 Land Decisions, 266, although involving a homestead entry, is directly in point, inasmuch as the claimant was seeking to "directly purchase" public lands while an employee of the General Land Office, and the prohibition, if prohibition there was, applied just as much to him as it would to a United States Mineral Surveyor whose rights had been initiated prior to his appointment.

In the case cited it was stated by the Department of the Interior (the emphasis being ours):

> "The facts are that Winans was appointed a copyist in the Recorder's Division of your office [General Land Office] on the 18th day of October, 1889, over four months after his entry was made; that he accepted the position and has continued to discharge the duties thereof up to the present time; that his family still reside in Oklahoma and that his home is still there. These facts are so palpably different from the facts in the McMicken *et al.* case, *supra* [10 Land Decisions, 96], that it is not deemed necessary to compare them. The position he holds cannot be said to give him any advantage, in finally securing the land, over the general public; his access to the records of the office can give him no information valuable to him pertaining to his entry or his rights to the tract; there is no opportunity afforded him to practice any fraud; he has nothing to do with the matter of adjudicating the question as to his compliance with the law when that question shall arise; in-

> deed he may not hold the place he does, or any other place in the land department when the time arrives to make final proof. In view of these facts I am of the opinion that Section 452, *supra*, does not apply in this case, for I do not believe that Congress intended by the enactment of said section *to deprive any one of valuable property rights*, theretofore lawfully vested in him, simply for the reason that, after such person has made settlement on public land, and made an entry, or application to enter such land under the homestead law, he received an appointment as a copyist in the General Land Office."

Directly in point as stating the view of the General Land Office as to the status of a U. S. Mineral Surveyor, is a letter addressed by the Commissioner to the United States Surveyor-General, Salt Lake City, Utah, dated June 17, 1909.

In this letter it is said:

> "A mineral surveyor, who previous to his appointment, had made a homestead entry, could complete his proofs and receive patent. (Winans vs. Beidler, 15 L. D., 266-268)."

These rulings show that it is the opinion of the land department that a person who *initiates* title to a tract of public land, either under the agricultural or mineral land laws, and afterward becomes an officer, clerk or employee in the General Land Office, does not thereby forfeit his previously acquired rights, but may in due course perfect his title and receive patent by submitting such proofs and making such payments as the law requires.

Nor, in cases where a mineral location is made after the locator has been appointed a mineral surveyor, has the practice of the land department gone further than to rule that if he proposes to retain the location he "shall forthwith be removed from office."

In connection with this we cite the case of Casimiro R. Barthelemy, where, under dates of May 29 and August 27, 1909, the Commissioner of the General Land Office gave the mineral surveyor the choice of relinquishing his location or of separation from the service, the only penalty the Commissioner could impose in case the mineral surveyor refused to relinquish the location, being to forthwith remove him from office.

Of course, the practice of the land department can be shown only by its decisions. Only decisions of the Secretary of the Interior are published in the form of reports, and, therefore, in order to show the practice existing in the General Land Office we have been compelled to secure certified copies of the decisions of the Commissioner upon which we rely in this connection, and we append to this supplemental brief copies of said decisions.

What was said in the case of Winans vs. Beidler regarding Winans, a homestead claimant, might with equal propriety be said of a mineral surveyor seeking to perfect title to a tract of mineral land.

The particular location here involved was unquestionably valid when made, except as to the excess. (Flagstaff S. M. Co. vs. Tarbett, 98 U. S., 463; Richmond M. Co. vs. Rose, 114 U. S., 576.)

That being so, his property rights having vested by a valid location (Belk vs. Meagher, 104 U. S., 279; Gwillim vs. Donnellan, 115 U. S., 45), his appointment to office, prior to his *amendment* of his location to bring it within the limitations as to acreage prescribed by law, cannot divest him of such *vested* rights. The only way he might have been divested of title was by failure to perform the "assessment" work prescribed by the statute, followed by an adverse relocation.

While our contention is that a mineral surveyor is not an officer, clerk or employee of the General Land Office within

the meaning of Section 452, U. S. Rev. Stat., and as such prohibited from purchasing the public lands, yet if it is admitted, for argument, that he is such an employee, then we submit that under the facts of this case, under the decisions of the land department—the tribunal having direct jurisdiction in the premises—and in reason, the location was valid and the land might be held, worked, and the legal title thereto obtained by the original locator or his grantees, notwithstanding he afterwards accepted an appointment as a United States Mineral Surveyor.

Nor is this in any manner changed by the fact that the original location as marked upon the ground included somewhat more than twenty acres, the excess having been eliminated by drawing in the corner posts prior to the attaching of any adverse rights.

It has been repeatedly held that the right acquired by a mining location is a *property* right. Assuredly, the appointment to the position of United States Mineral Surveyor could not operate to divest the surveyor of such property right in the absence of some express statutory enactment to that effect.

CONSAUL & HELTMAN,
Attorneys and Counselors for Petitioners.

CAMPBELL, METSON, DREW,
OATMAN & MACKENZIE,
AND
E. H. RYAN,
Of Counsel.

Charles F. Consaul.

"B" 4-207 r.
MEL

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE.

WASHINGTON, D. C., *October* 6, 1909.

I hereby certify that the annexed copies of letters are true and literal exemplifications from the records of this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

JOHN O'CONNELL,
Acting Recorder of the General Land Office.

[SEAL.]

PSB

In reply please refer to ☞ 9-49389-85608 "N" HGP
1 Ex. 1 Ex.
H. G. P.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE.

WASHINGTON, D. C., *August 27*, 1909.

Address only the
Commissioner of the General Land Office.

Ex parte
CASIMIRO R. BARTHELEMY, : Relieved from suspension.
Mineral Surveyor.

U. S. SURVEYOR-GENERAL,
Phoenix, Arizona.

Sir:

May 29, 1909, you were directed to notify Mineral Surveyor Casimiro Barthelemy that he was suspended, and required to file within sixty days his affidavit, that he had filed for record with the county recorder his waiver and abandonment of the Colera location, and that he does not hold possession or title to any mining claim by location or purchase acquired during his appointment as mineral surveyor.

August 2, 1909, you forwarded the required affidavit, and the suspension of May 29, 1909, is accordingly hereby removed.

Copy hereof enclosed for service.

Very respectfully,

S. V. PROUDFIT,
Acting Commissioner.

J. McP.

N W. J. H.

DEPARTMENT OF THE INTERIOR,

9-62235. GENERAL LAND OFFICE,
HGP
HGP WASHINGTON, D. C., *June* 17, 1909.
1 Ex.

Address only the
Commissioner of the General Land Office.

: Mineral Surveyor—Sec. 452, R. S.

UNITED STATES SURVEYOR-GENERAL,
Salt Lake City, Utah.

Sir:

I have your letter of the 25th ultimo, referring for consideration, copy of letter of same date from Clarence S. Jarvis, a mineral surveyor, asking certain questions in relation to Par. 53 of the Manual of Instructions (4-657).

A mineral surveyor who, previous to his appointment, had made a homestead entry, could complete his proofs and receive patent. (Winans vs. Beidler, 15 L. D., 266-268.)

The prohibition in Sec. 452, R. S., became operative from the date of the original act, April 25, 1812, and not from date of the decision in the Bradford case (36 L. D., 61), cited in Par. 53 of the Manual.

Very respectfully,

FRED DENNETT,
Commissioner.

Board of Law Review.
By C. C. HELTMAN.

N W. J. H.

DEPARTMENT OF THE INTERIOR,

9-49389. GENERAL LAND OFFICE,
HGP
HGP WASHINGTON, D. C., *May* 29, 1909.
1 Ex.

Address only the
Commissioner of the General Land Office.

Mineral Surveyor—mineral location.

UNITED STATES SURVEYOR-GENERAL,
Phoenix, Arizona.

Sir:

It having been represented to this office that Mineral Surveyor Casimiro R. Barthelemy had made in his own name and for himself a mineral location known as the Colera lode claim in Pima mining district, Arizona, you were by letter of March 1, 1909, directed to investigate the charge, and if found to be true, pursuant to department decision in the case of Seymour K. Bradford (36 L. D., 61), allow him sixty days within which to show cause why his appointment should not be revoked.

You report, the 26th ultimo, with evidence of service and copy of response. You find the charge to be true and inclose a certified copy of the location of the Colera lode, a relocation of the Old Goldtree mine; the location was dated and posted November 30, 1908, and recorded December 2, 1908; it is signed, Casimiro R. Barthelemy.

Mineral Surveyor Barthelemy in his response, which is dated April 19, 1909, offers the following in extenuation of the charge which he admits to be true.

> On December 2, 1908, I made a location of one claim known as the Calera claim, which Calera means in Spanish Lime Kilm, in which I build a Lime Kilm, to burn lime, of course my intentions were good, and as I can prove that there is no mineral whatever on the ground but a small lime hill, except lime is *classfied* as mineral. If I would have seen any ledge or even a stain of mineral I would never have attempted to located, as I had the *oppurtunities* of locating in valuable districts as the Mowery, Imperial Copper Co. and other districts but as I knew it would be wrong in locating Mineral ground therefore I would not do it. If you wish statements from mining men regarding the claim, I can prove that there is no mineral.

The response is very unsatisfactory; it flatly contradicts the statement made in the notice of location, that there are in the land "valuable mineral deposits" and the repeated reference therein to "the discovery shaft," and places the mineral surveyor in the position of making a mineral location for land which he believed at the time contained no mineral whatever, such as contemplated by the mining laws which in itself was an attempted evasion of the law.

You will notify Mineral Surveyor Barthelemy that he is hereby suspended, and required to file within sixty days for consideration by this office his affidavit that he has filed for record with the County Recorder, his waiver and abandonment of the Colera location, and that he does not hold possession or title to any mining claim by location or purchase acquired during his appointment as mineral surveyor, and that in default his appointment will be revoked withour further notice.

Very respectfully,

FRED DENNETT,
Commissioner.

5

No. 84

In the Supreme Court

OF THE

United States

FRANK H. WASKEY, JOSEPH M. CRABTREE, J. POTTER WHITTREN and ANDREW EADIE,
Petitioners,

vs.

JOSEPH HAMMER, OTTO HALLA and B. SCHWARZ,
Respondents.

MOTION OF RESPONDENTS TO DISMISS WRIT OF CERTIORARI ISSUED HEREIN.

GEORGE W. REA,
Attorney for Respondents.

ALBERT H. ELLIOT,
Of Counsel.

Filed this_____day of February, 1911.

JAMES H. McKENNEY, Clerk.

By_____Deputy Clerk.

PUBLISHING CO., SAN FRANCISCO.

No. 264

In the Supreme Court

OF THE

United States

FRANK H. WASKEY, JOSEPH M. CRABTREE, J. POTTER WHITTREN and ANDREW EADIE,
Petitioners,

vs.

JOSEPH HAMMER, OTTO HALLA and B. SCHWARZ,
Respondents.

MOTION OF RESPONDENTS TO DISMISS WRIT OF CERTIORARI ISSUED HEREIN.

Come now the respondents Joseph Hammer, Otto Halla and B. Schwarz, in the above entitled action, and move the above entitled Court to dismiss the writ of certiorari heretofore issued in said cause to the Circuit Court of Appeals for the Ninth Circuit, and as ground for said motion respondents allege that this Court was and is entirely without jurisdiction to issue said writ or to make any order in connection therewith. And in that behalf, respondents allege the following facts appearing of record herein.

The controversy involves the question of title to mining property located in the Territory of Alaska. The original decision was in favor of these respondents and was entered by the District Court of Alaska after the verdict of a jury. On appeal by writ of error sued out by petitioners herein, the Circuit Court of Appeals for the Ninth Circuit affirmed the judgment of the lower Court. Thereafter petitioners applied to this Court for a writ of certiorari alleging various grounds of complaint. Respondents did not appear in opposition to the motion and the same was granted and the writ of certiorari issued. Respondents now allege that this Court was and is entirely without jurisdiction to issue the said writ of certiorari; that the said judgment of the said Circuit Court of Appeals for the Ninth Circuit has become final; and that an order should be made by this court herein dismissing said writ of certiorari and all proceedings in connection therewith.

And respondents will ever pray.

JOSEPH HAMMER,
OTTO HALLA,
B. SCHWARZ,
Respondents.

CERTIFICATE OF COUNSEL.

I hereby certify that I have carefully examined the foregoing motion to dismiss the writ of certiorari herein, and that in my opinion, the same is

well founded, and that the case is one in which the motion of respondents should be granted.

ALBERT H. ELLIOT,
Counsel for Respondents.

To Attorneys for Petitioners:

Please take notice that on Monday, the sixth day of March, 1911, on the opening of Court on that day, or as soon thereafter as the matter can be heard, we shall move the Supreme Court of the United States, at the court room thereof in the City of Washington, District of Columbia, that the foregoing motion to dismiss the writ of certiorari issued herein, be granted.

Dated at San Francisco, this 4th day of February, 1911.

GEORGE W. REA,
Attorney for Respondents.

ALBERT H. ELLIOT,
Of Counsel:

Service of the above and receipt of copy thereof, together with copy of the foregoing motion is hereby admitted at San Francisco, State of California, this 4th day of February, 1911.

ALBERT FINK,
J. C. CAMPBELL,
W. H. METSON,
Attorneys for Petitioners.

No. 84

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Respondents.

BRIEF IN SUPPORT OF THE MOTION TO DISMISS WRIT OF CERTIORARI

GEORGE W. REA,
Attorney for Respondents.

ALBERT H. ELLIOT,
Of Counsel.

Filed this _____ *day of February, 1911.*

JAMES H. McKENNEY, Clerk.

By _____ *Deputy Clerk.*

BARRY PRINTING CO., SAN FRANCISCO.

No. 264

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BRIEF IN SUPPORT OF THE MOTION TO DISMISS WRIT OF CERTIORARI.

The argument which shows that the Supreme Court can exercise no appellate jurisdiction over cases such as the one at bar, rests upon three propositions as follows:

(a)

The Supreme Court can exercise no appellate jurisdiction (except in cases provided by Section 2 of

Article 3 of the Constitution), save "with such ex-
" ceptions, and under such regulations as the Con-
" gress shall make".

American Construction Company v. Jacksonville Railway, 148 U. S. 373;
In re Dorr, 3 Howard 103;
United States v. Perrin, 131 U. S. 55;
Re Vallandigham, 1 Wallace 243.

The above cases should be distinguished from those cases in which the Supreme Court exercises original jurisdiction which Congress can neither regulate, control nor take away.

United States v. Hudson, 7 Cranch 32;
Cohen v. Virginia, 6 Wheaton 264;
Marberry v. Madison, 1 Cranch 137.

(b)

The Circuit Courts of Appeals Act gives to the Supreme Court jurisdiction to issue writs of certiorari in proper cases.

The Act referred to was passed March 3, 1891, and is entitled "An Act to establish Circuit Courts of Ap-
" peals, and to define and regulate in certain cases
" the jurisdiction of the Courts of the United States,
" and for other purposes" (26 Stat. L. 826).

The part of the above Act under which the writ of certiorari was issued in the case at bar is as follows:

"That the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final

decision in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law,

"And the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different States; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws and in admiralty cases,

"Excepting that in every such subject within its appellate jurisdiction the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision.

"And thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit courts of appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.

"And excepting also that in any such case as is hereinbefore made final in the circuit court of appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."

(c)

The Alaska Code which is found in the Act establishing a civil government for Alaska, supersedes the Circuit Courts of Appeals Act and gives appellate jurisdiction to the Supreme Court in cases originating in the District Court of Alaska, only when the judges of the Circuit Court of Appeals shall certify some question or proposition to the Supreme Court.

The Act setting forth the Alaska Code was approved June 6, 1900, and is known as "An Act " making further provision for a civil government " for Alaska, and for other purposes" (31 Stat. L. 321).

Section 505 of the said Act reads as follows:

> "The judgments of the circuit court of appeals shall be final in all cases coming to it from the district court, but whenever the judges of the circuit court of appeals may desire the instruction of the Supreme Court of the United States upon any question or proposition of law which shall have arisen in any case pending before the circuit court of appeals on writ of error to or appeal from the district court, judges may certify such question or proposition to the Supreme Court and thereupon the Supreme Court shall give its instruction upon the questions and propositions certified to it, and its instruction shall be binding upon the circuit court of appeals."

The above Act of Congress was approved at a much later date than the Circuit Courts of Appeals Act and is the latest attempt of Congress to regulate

the appellate jurisdiction of the Supreme Court at least so far as cases originating in the District Court of Alaska are concerned. It is admitted that the judges of the Circuit Court of Appeals did not in the case at bar request the instruction of the Supreme Court upon any question or proposition of law. The direct statement of the section quoted to the effect that the judgments of the Circuit Court of Appeals shall be final excepting in the one case specifically stated, would seem to be conclusive. We do not see how warrant can be found for the issuance of a writ of certiorari under a prior Act which is superseded by the Alaska Act in direct and unequivocal terms.

The same point arose after the passage of the Act establishing the Court of Appeals for the District of Columbia known as "An Act to Establish a Court of " Appeals for the District of Columbia and for other " purposes", approved February 9th, 1893 (27 Stat. L. 434).

The Supreme Court refused to issue a writ of prohibition because the Act above cited was the latest Act of Congress on the question of the appellate jurisdiction of the Supreme Court, and since under that Act the Supreme Court was not given appellate jurisdiction, it would not issue a writ which was merely ancillary to its appellate jurisdiction.

> "This is equally true of this Court, that is to say, that in cases over which we possess neither original nor appellate jurisdiction we cannot grant prohibition or mandamus or certiorari as ancillary thereto."
>
> *In re Massachusetts,* 197 U. S. 482.

We submit, therefore, that this Court had no appellate jurisdiction over the case at bar and no power to issue the writ of certiorari herein and the same should be dismissed.

Dated, San Francisco,
February 4, 1911.

Respectfully submitted,

GEORGE W. REA,
Attorney for Respondents.

ALBERT H. ELLIOT,
Of Counsel.

In the Supreme Court

OF THE

UNITED STATES

FRANK H. WASKEY, JOSEPH M. CRABTREE, J. POTTER WHITTREN and ANDREW EADIE,
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Respondents.

No. 264.

BRIEF IN OPPOSITION TO RESPONDENTS' MOTION TO DISMISS THE WRIT OF CERTIORARI.

We think respondents' motion to dismiss the certiorari without merit.

It cannot be assumed that Congress intended to give to the people of Alaska any less right to have their causes reviewed by certiorari in this Court than has been granted to citizens of the United States residing elsewhere.

The magnitude of the interests often involved compares very favorably with that of causes com-

ing from other sections of the Union; nor are the questions sometimes raised less important.

The Territory is settled by American citizens, who took with them the same inherent rights to the protection of this Court retained by those who remain in more favored localities.

In a republic, where the laws are uniform and of general application, it would seem a violent presumption to assume that Congress intended citizens residing in Kansas to enjoy privileges denied those living in Alaska.

The people of Alaska are as much entitled to the protection of this Court as those of New York, and perhaps in greater need thereof.

To say that where the Circuit Court of Appeals has committed a manifest error this Court has power to issue certiorari if the case originates in Nevada, but no such jurisdiction if it comes from Alaska would seem an anomaly, and it would appear, if this be true, an inhibition upon residence in that Territory.

Could such have been the intention of Congress? If so, why?

Yet the whole argument of respondents is based upon an implied intention of Congress to repeal by the Act of June 6, 1900, the law as it theretofore stood.

The argument is, that though this Court formerly

had jurisdiction to issue the writ, this power was revoked by the Act of June 6, 1900, making further provision for a civil government for Alaska (31 St. L., 321). Yet this Act was induced by the growing importance of the Territory and the rapid development of its resources.

Its purpose was not to abridge or restrict rights theretofore existing, but, on the contrary, to enlarge, amplify and make further provision therefor.

In this connection, it is peculiarly significant to note that neither the appellate jurisdiction nor procedure was in any respect changed, modified or amended, unless as herein contended by respondents.

By the Act of March 3, 1899, Section 202 (23 St. L., 24), appeals and writs of error in criminal actions were allowed from the judgment of the District Court to the Supreme Court of the United States, or to the Circuit Court of Appeals for the Ninth Circuit, in the same manner and under the same regulations as from the Circuit and District Courts of the United States.

By the Act of June 6, 1900, appeals and writs of error were allowed direct to the Supreme Court of the United States in prize cases, in cases which involved the construction or the application of the Constitution of the United States, or in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority was drawn in question, or in which the

Constitution or law of a State was claimed to be in contravention of the Constitution of the United States (Sec. 504).

An appeal was allowed to the Circuit Court of Appeals from any interlocutory order granting or dissolving, or refusing to grant or dissolve, an injunction (Sec. 507).

It was further enacted:

> "All provisions of law now in force regulating procedure and practice of causes brought by appeal or writ of error to the Supreme Court of the United States, or to the Circuit Court of Appeals for the Ninth Circuit, except insofar as the same are inconsistent with any of the provisions of this Act, shall regulate the procedure and practice in cases brought to the courts respectively from the District Court for the District of Alaska" (Sec. 508).

By Section 15 of the Act of March 3, 1891, establishing the Circuit Court of Appeals (26 St. L., 826), it was provided:

> "That the Circuit Courts of Appeal, in cases in which the judgments of the Circuit Courts of Appeal are made final by this Act shall have the same appellate jurisdiction by writ of error or appeal to review the judgments, orders and decrees of the Supreme Courts of the several Territories as by this Act they may have to review the judgments, orders and decrees of the

District Court and Circuit Courts; and for that purpose the several Territories shall by orders of the Supreme Court, to be made from time to time, be assigned to particular circuits."

There being in the District of Alaska no court of record other than the District Court, it was held in the case of

The Coquitlam vs. *United States,* 163 U. S., 347,

that the District Court was to be regarded as the Supreme Court of that Territory within the meaning of the Act above quoted, and of the order of the Supreme Court assigning Alaska to the Ninth Circuit.

In the execution of the duty imposed by the above section, this Court, by an order promulgated May 11, 1891, assigned the Territory of Alaska to the Ninth Judicial Circuit.

It will be thus observed that prior to the Act of June 6, 1900, the appellate jurisdiction of causes originating in the Territory was controlled by the provisions of the Act of March 3, 1891, establishing the Circuit Court of Appeals.

It will be further observed that by the Act of June 6, 1900, no change was made in the then existing law with reference either to the appellate jurisdiction or procedure, unless with the single exception claimed by respondents.

By the Act of June 6, 1900, direct appeals and writs of error were permitted to this Court in the identical cases where such had theretofore been allowed.

Nor was any change made in the prior law as to the allowance of appeals and writs of error to the Circuit Court of Appeals.

So appeals were allowed as theretofore from orders granting or denying or refusing to grant or dissolve an injunction; nor was any change made in the practice or procedure upon writ of error or appeal.

It would seem then somewhat far fetched to assume that Congress, in continuing the identical laws theretofore in effect with reference to this subject, intended to make the single exception claimed by respondents, when no motive therefor can be assigned or conceived.

The exception, permitting this Court to issue certiorari when it sees fit, contained in the sixth section of the Act creating the Circuit Courts of Appeal was designed to give this Court a general supervisory power and control over the decisions of the various Circuit Courts of Appeal, to the end that the decisions thereof might be kept uniform, that flagrant injustice might be prevented and that questions of large public import might receive the final adjudication of this tribunal.

It is not observed how any of these objects would be attained by denying the jurisdiction of this Court

to issue certiorari in a case originating in Alaska. Uniformity of decision would not be secured thereby; flagrant injustice would not be prevented, and the right of this Court to finally settle and determine questions of large public import would be denied.

It is indeed hard to conceive how Congress could intend that a justiciable case arising in the Territory of New Mexico might be reviewed by certiorari from this Court, while the identical cause arising in Alaska could not be.

This is, however, not the first effort that has been made to limit the right of review of causes of action originating in Alaska.

In

The Coquitlam vs. *United States,* 163 U. S., 347,

it was insisted that the Circuit Court of Appeals for the Ninth Circuit had no right to review the judgment of the District Court of Alaska, for that: (1) The latter court was not a District Court within the meaning of the sixth section of the Act of 1891. (2) And was not a Supreme Court of a Territory.

And it was insisted that the fact that an appeal or writ of error to the Eighth Circuit, or to the Supreme Court of the United States was permitted from decisions of the United States Court in the Indian Territory by the thirteenth section of the Act creating

the Circuit Court of Appeal was a conclusive indication that Congress did not intend that an appeal or writ of error should lie from the District Court of Alaska to the Circuit Court of Appeals for the Ninth Circuit, for this, being neither a Circuit nor District Court of the United States, nor a Supreme Court of a Territory, it was contended that Congress would have made express provision for review of the decisions of this Court by writ of error or appeal in like manner as it had made provision for review by appeal or writ of error from the decisions of the United States Court of the Indian Territory.

But this Court held, that the whole scope of the Act creating the Circuit Court of Appeal should be looked at and that within the provisions and evident intent of this Act the District Court of Alaska would be considered a Supreme Court of a Territory.

The Court said:

> "No reason can be suggested why a Territory of the United States, in which the court of last resort is called a Supreme Court, should be assigned to some circuit established by Congress that does not apply with full force to the Territory of Alaska.
>
> "Looking at the whole scope of the Act of 1891, we do not doubt that Congress contemplated that the final orders and decrees of the courts of last resort in the organized Territories of the United

States—by whatever name those courts were designated in legislative enactments—should be reviewed by the Circuit Court of Appeals, leaving to this Court the assignment of the respective Territories among the existing circuits."

In

Lau Ow Bew vs. *United States,* 144 U. S., 47; 36 L. Ed., 340;

on writ of error to review a decision of the Circuit Court of Appeals for the Ninth Circuit, in a case of habeas corpus, it was suggested that this Court was without jurisdiction to issue the writ.

The argument against the jurisdiction was, that by Section 4 of the Act creating the Circuit Court of Appeals, no review by appeal or otherwise was allowed except as provided in the Act.

Under Section 5, appeals or writs of error were allowed from the Circuit Courts directly to this Court in six specified cases. This case was not one so specified.

By Section 6, it was provided that the Circuit Courts of Appeal

> "shall exercise appellate jurisdiction to review . . . final decision of the District Court and the existing Circuit Courts in all cases other than those provided for in the preceding section of this Act, unless otherwise provided by law."

And the same section made the judgments of the Circuit Courts of Appeal final in five specified cases, but this case was not one so specified.

Section 6 further provided:

> "In all cases not hereinbefore, in this section, made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs."

The habeas corpus case was one not specified in Section 5, permitting appeals to be taken directly to the Supreme Court, nor in Section 6, as one in which the judgment of the Circuit Court of Appeals was final; nor in the fourth paragraph of Section 6, as a controversy where the matter involved exceeded the sum of one thousand dollars.

Under the express provisions of the Act therefore, it appeared that it could not be taken directly to the Supreme Court from the Circuit Court, nor was it a case in which an appeal lay as a matter of right from the judgment of the Circuit Court of Appeals because of the lack of the jurisdictional amount.

It was insisted that it could not be reviewed by certiorari issued by this Court under the third paragraph of Section 6, permitting this Court:

> "In any such case as is *hereinbefore made final* in the Circuit Court of Appeals . . . to

require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination."

for the very obvious reason that it was not a case made final by the decision of the Circuit Court of Appeals.

But this Court very properly overruled this objection to its jurisdiction, holding, that by the Act creating the Circuit Court of Appeals there was an entire distribution of jurisdiction, and that all the appellate jurisdiction not vested in this Court was vested in the court created by the Act—that is, the Circuit Court of Appeals.

Thus, in effect, this Court held, that though the case was not within the terms of the exception contained in the third paragraph of the sixth section of the Act permitting the issuance of the writ on account of its not being a case in which the decision of the Circuit Court of Appeals was final, that nevertheless this Court had the power to issue the writ.

The Court said (italics ours):

"The words, 'unless otherwise provided by law,' were manifestly inserted out of abundant caution, in order that any qualification of the jurisdiction by *contemporaneous or subsequent acts should not be construed as taking it away* except when *expressly* so provided. *Implied* repeals were intended to be thereby *guarded* against."

The argument of respondents, based upon the theory of an implied repeal of the Act creating the Circuit Court of Appeal by the Act of June 6, 1900, is, we insist, in the very teeth of this decision.

This decision was rendered March 14, 1892, and it must be assumed that the Act of June 6, 1900, was passed subject thereto.

As before pointed out, it would indeed be curious if Congress by the Act of June 6, 1900, intended to change the existing law in this particular, without using express language indicating this intention.

In

Forsyth vs. *Hammond,* 166 U. S., 506; 41 L. Ed., 1095,

referring to the Act of March 3, 1891, creating the Circuit Court of Appeals, this Court said:

> "It was foreseen that injurious results might follow if an absolute finality of determination was given to the courts of appeal. Nine separate appellate tribunals might by their differences of opinion, unless held in check by the reviewing power of this Court, create an unfortunate confusion in respect to the rules of Federal decision.
>
> "Cases of a class in which finality of decision was given to the Circuit Courts of Appeal might involve questions of such public and national importance as to require that a consideration and determination thereof should be made by the supreme tribunal of the nation. It was obvious that

all contingencies in which a decision by this tribunal was of importance could not be foreseen, and so there was placed in the acts creating the courts of appeal, in addition to the other provisions for review by this Court, this enactment" (referring to Paragraph 3 of Section 6).

It would indeed be unfortunate if in Alaska, with its many thousands of miles of seacoast, its sealing, fishing and other rapidly developing industries, such a cause should arise as might involve the most serious international controversy and this Court be found without jurisdiction to review and finally determine the same.

The Court further said (italics ours):

"The general language of this clause is noticeable. It applies *to every case* in which but for it the decision of the Circuit Court of Appeals would be absolutely final, and authorizes this Court to bring before it for review and determination of the case so pending in the Circuit Court of Appeals, and to exercise all the power and authority over it which this Court would have in any case, brought to it by appeal or writ of error.

"Unquestionably the *generality* of this provision was not a mere matter of accident. It expressed the thought of Congress distinctly and clearly, and was intended to vest in this Court a *comprehensive* and *unlimited* power.

"All that is essential is that there be a case pending in the Circuit Court of Appeals, and of

those classes of cases in which the decision of the Court is declared a *finality,* and this Court may, by virtue of this clause, reach out its writ of certiorari and transfer the case here for review and determination.

"We re-affirm in this case the propositions heretofore announced, to wit, that the power of this Court in certiorari extends to *every case pending in the Circuit Courts of Appeal,* and may be exercised at any time during such pendency, provided the case is one, but for this provision of the statute, would be *finally* determined in that court. And further, that while this power is co-extensive with *all possible necessities* and sufficient to secure to this Court a final control over the litigation in *all the courts of appeal,* it is a power which will be sparingly exercised, etc."

So, in

Holden vs. *Stratton,* 24 Sup. Ct. Rep., 45; 191 U. S., 115;

it was held that certiorari and not appeal was the proper method of obtaining a review in this Court of a decision of the Circuit Court of Appeals revising an order of the District Court allowing an exemption in a bankruptcy case, though such a cause was not one made final by the decision of the Circuit Court of Appeals within the terms of Paragraph 1 of Section 6 of the Act of March 3, 1891, and therefore not one within the terms of Paragraph 3 of Section 6, granting to this Court jurisdiction to inquire

by certiorari or otherwise into any such case as was made *final* in the Circuit Court of Appeals.

So, in

Whitney vs. *Dick*, 26 Sup. Ct. Rep., 584; 202 U. S., 132;

the Circuit Court of Appeals for the Ninth Circuit discharged a prisoner who had been convicted in the District Court for the District of Idaho, upon an application for habeas corpus and certiorari to the former court.

An appeal was taken by Whitney, the warden of the Idaho penitentiary, to this Court, and afterward a writ of certiorari to the Circuit Court of Appeals prayed for and allowed.

The judgment of the Circuit Court of Appeals releasing the prisoner on the certiorari and habeas corpus was not such a one as is made *final* by Paragraph 1 of Section 6 of the Act of March 3, 1891, and therefore without the terms of Paragraph 3 of Section 6 of this Act granting power to this Court to issue writs of certiorari.

This Court, nevertheless, dismissed the appeal as being improper, but *reversed* the order of the Circuit Court of Appeals on the writ of certiorari.

In re Alexander McKenzie, Petitioner, 180 U. S., 536; 45 L. Ed., 657; 21 S. Ct. Rep., 468;

we submit is directly in point and conclusive of the matter.

Here the petitioner, McKenzie, was appointed receiver of certain Alaska mines. Defendants sought an appeal from the order appointing the receiver, but this appeal was denied because not provided for by the *Act of June 6, 1900,* making further provision for a civil government for Alaska.

Thereupon, the defendants procured from the Circuit Court of Appeals for the Ninth Circuit an order allowing the appeal, certiorari in aid thereof, and supersedeas pending the hearing, but McKenzie refused to obey the writ of supersedeas commanding him to deliver possession of the premises therein described to the defendants, from whom he had taken the same under the order of the District Court appointing him receiver, upon the ground, among other things, that inasmuch as no appeal was allowed by the Act of June 6, 1900, from an interlocutory order appointing a receiver in Alaska, such order was not reviewable by the Circuit Court of Appeals, and the supersedeas was therefore void.

McKenzie was forthwith arrested for contempt of the Circuit Court of Appeals in refusing to obey this supersedeas and such proceedings were had that he was duly convicted and punished therefor.

Upon the judgment of conviction and his due commitment, he made original application to this Court for leave to file a petition for habeas corpus.

Upon the hearing in this Court it was pointed out that under Section 507 of the Act of June 6, 1900, making further provision for a civil government for Alaska, *no appeal was allowable from the interlocutory order appointing a receiver.*

The section is as follows:

> "An appeal may be taken to the Circuit Court of Appeals from any interlocutory order granting or dissolving an injunction, refusing to grant or dissolve an injunction, made or rendered in any cause pending before the District Court within sixty days after the entry of such interlocutory order."

It was claimed, however, by those opposing McKenzie's application, that while Section 507 of the Act of June 6, 1900, did not in terms authorize an appeal from an interlocutory order appointing a receiver, that such order was appealable under the provisions of the amendment to Section 7 of the Act of March 3, 1891, creating the Circuit Court of Appeals (31 St. L., 660), and that the *Act of June 6, 1900, applicable to Alaska, should be read in pari materia with the Act creating the Circuit Court of Appeals and the acts amendatory thereof.*

This position was controverted upon exactly the same argument advanced by respondents herein—that is to say, that the Act of June 6, 1900, applicable to Alaska, was a repeal by implication of the act creating the Circuit Court of Appeals, and that if it

had been the intention of Congress to make appealable an order appointing a receiver in Alaska, it would so have appeared in the Act, and that the fact that such an order was made appealable by the amendment to the seventh section of the Act creating the Circuit Court of Appeals, while expressly excluded from section 507 of the Act of June 6, 1900, *was conclusive that it was the intention of Congress that such an order should not be appealable when made by a district court in Alaska.*

But this Court held that the Act of June 6, 1900, applicable to Alaska, should be read *in pari materia* with the *Act of March 3, 1891,* creating the Circuit Court of Appeals, and its amendments, so as to give effect to the provisions contained in the Act of March 3, 1891, but *omitted* from the Act of June 6, 1900.

It is not apparent why the same construction which was extended to section seven should not be applied to section six of the same Act. That is to say, if section 7 of the Act of March 3, 1891, and its amendments, is to be read *in pari materia* with the Act of June 6, 1900, making further provision for a civil government for Alaska, so as to give effect to provisions contained in the former but omitted from the latter, it is not quite clear why section 6 should not likewise be read *in pari materia,* so as to give like effect to a provision in it contained and omitted from the Act applicable to Alaska.

This, of necessity, must have been precisely what Congress intended.

The case of

In re Massachusetts, 197 U. S., 482,

cited by respondents, has no application to the matter under discussion.

Here, a cause in equity was pending in the Supreme Court of the District of Columbia by John B. Cotton, complainant, against Leslie M. Shaw, Secretary of the Treasury, and John L. Bates, Governor of the Commonwealth of Massachusetts, in which the complainant asserted his right to an attorney's lien upon the papers of his client, including a certain warrant for $1,611,740.85, and prayed, among other things, that Leslie M. Shaw might be restrained from issuing a duplicate thereof, and John L. Bates restrained from asking, demanding or receiving such duplicate.

While this suit was pending in the Supreme Court of the District of Columbia, the State of Massachusetts applied to this Court for writs of prohibition, *mandamus* and *certiorari* to restrain the justices of the Supreme Court of the District of Columbia from taking further proceedings, and entertaining further jurisdiction therein.

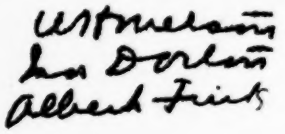
This Court merely held, that as it had neither original nor appellate jurisdiction over the controversy, it was without power to grant the prayed for writs as

ancillary thereto, and the reason of the decision is based upon the fact of the existence of a Court of Appeals for the District of Columbia, having appellate jurisdiction over the Supreme Court and to which, of course, this application should have been addressed.

The case would be in point, if the petitioners herein had made their application for *certiorari* to this Court directly from the judgment of the District Court of Alaska, and before the review thereof by writ of error to the Circuit Court of Appeals for the Ninth Circuit.

That this Court is without jurisdiction to issue, when it sees fit, a writ of *certiorari* to review the final decision of the Court of Appeals for the District of Columbia we think will hardly be contended.

Respectfully submitted.



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Attorneys for Petitioners.

Supreme Court of the United States

October Term, 1911.

No. 84.

FRANK H. WASKEY, JOSEPH M. CRABTREE, J. POTTER WHITTREN and ANDREW EADIE,
Plaintiffs in Error and Petitioners,

vs.

JOSEPH HAMMER, OTTO HALLA and D. SCHWARTZ,
Defendants in Error and Respondents.

BRIEF IN BEHALF OF FRANK H. WASKEY AND JOSEPH M. CRABTREE.

This action is in the Supreme Court of the United States on Writ of Certiorari issued to the Circuit Court of Appeals, Ninth Circuit, in October, 1909.

This litigation involves the construction of acts of Congress, and an excess of jurisdiction upon the part of the Circuit Court of Appeals because on its own motion, without process or pleadings, it "intervened" the United States as a party to this action by enforcing the doctrine of "office found."

THE FACTS.

Whittren, a qualified citizen, on January 2nd, 1902, duly and fully marked by stakes a placer mine at Nome, Alaska, and posted thereon a written location notice which was recorded. This claim (the "Bon Voyage") was in a gold gravel district where a large area of auriferous sands was overlaid with sod.

Later Whittren, within his stakes, dug a hole through the tundra to the gold-bearing strata and extracting a portion thereof, panned the same and found gold dust therein (fols. 59-60, 62).

November 11, 1903, Whittren, who *that* year had been appointed as a Deputy Mineral Surveyor while surveying his location, discovered for the first time that his claim contained a fraction more than twenty acres (fols. 64-5, 72).

He then drew in some of his monuments, discarding the excess area, and in so doing the hole from which he had first panned gold dust, was a few feet outside the new stakes (fols. 73-4).

In December, 1903, he made another discovery of gold dust within his readjusted lines (fol. 87).

In December, 1904, respondents Halla and Schwartz "jumped" the "Bon Voyage" by overlapping thereon their "Golden Bull" location (fols. 45-50, 54).

In 1905, Whittren, for value, conveyed to Eadie

a one-half interest, and in June, 1906, they leased for value to Waskey and Crabtree this "Bon Voyage" claim (fols. 89, 91).

These grantees were innocent parties and from the date of the making of the conveyances, continuously worked the ground during the mining season (fols. 91-2).

After the pay streak was developed and demonstrated by the said lessees of Eadie and Whittren, the respondents herein instituted ejectment, basing their title on their "Golden Bull" location.

Waskey and Crabtree, lessees of Eadie, in their answer, set up the staking of the "Bon Voyage" location on January 1, 1902, the discovery of gold later and the survey in November, 1903, which showed a trifling excess over the legal limit; the drawing in of the lines so as to cast off this surplus; their leases, possession and development of the gold-bearing gravels.

The alleged invalidity of the "Bon Voyage" because Whittren drew in his lines in November, 1903, and thereby left the hole from which he first panned gold dust, outside of his new stakes, or the fact that Whittren was disqualified in December, 1903, when he panned gold dust within his readjusted lines from his second hole because he was then a deputy mineral surveyor, were *not* pleaded.

Whittren's appointment as a deputy mineral surveyor was collaterally disclosed at the trial.

Upon the close of the evidence plaintiffs made a motion for and a directed verdict was given because on November 11, 1903, when Whittren drew in his lines he had left his first discovery hole outside thereof and that his second discovery of gold in December, 1903, although long prior to plaintiffs' location, was made at a time when he was a mineral surveyor and disqualified. Judgment followed accordingly and it was affirmed on appeal for the above reason.

The Circuit Court of Appeals found that Whittren's "Bon Voyage" location made in 1902 was valid; that he had a right in November, 1903, to draw in his stakes and abandon the excess over twenty acres; that when in so doing he excluded from within the lines of his location the first discovery hole, he lost one of the essentials of his location; that Whittren's second discovery in December, 1903, before other rights had intervened, would have *re-validated* his claim were it not that he was then a mineral surveyor and therefore, under section 452 of the Revised Statutes, disqualified.

The Circuit Court of Appeals in its opinion treated the case as though it were an adverse patent proceeding with the United States an active adverse *party* to the litigation. It declared the Whittren location void, although no issue had been raised by the pleadings as to the disqualification of Whittren and although both discoveries of Whittren in Jan-

uary, 1902, and December, 1903, were prior to that of plaintiffs below. It dealt out the same penalty to the innocent purchasers for value without notice, who by their expenditures of labor and money, had proven the ground valuable.

The Circuit Court of Appeals declared on the petition to recall the mandate that the question of whether the United States could be intervened in a case where there was no process or pleading to support its presence, thereby allowing an individual to avail himself of the doctrine of "office found," to be a close one.

This case presents features of peculiar hardship. The decision of the Circuit Court of Appeals metes out to the innocent purchasers from Whittren, a punishment which we assert the statute itself (Sec. 452, R. S.), does not apply even to persons coming within the prohibition thereof.

In other words our contention is, that the statute provides but one penalty for a violation thereof, viz: forfeiture of employment.

But conceding that by construction it may be said to make invalid any mineral location made by the persons mentioned therein, such invalidity could be questioned alone by the Government under the proceeding of "office found."

STATUTE UNDER CONSTRUCTION.

"The officers, clerks and employees in the General Land Office are prohibited from di-

rectly or indirectly purchasing or becoming interested in the purchase of any of the public lands; and any person who violates this section shall forthwith be removed from his office."

Section 452, R. S. U. S.

Petitioners' contention:

Error of Circuit Court of Appeals—

(1) In applying doctrine of "office found";

(2) In failing to apply doctrine controlling in the case of innocent purchasers.

(3) In maintaining that deputy mineral surveyors come within purview of said Sec. 452, R. S. U. S.

ARGUMENT.

I.

THE CIRCUIT COURT OF APPEALS ERRED IN APPLYING THE DOCTRINE OF "OFFICE FOUND" IN THIS CASE.

That this doctrine should not be applied to the "Bon Voyage" location is demonstrated by:

(a) The alien cases;

(b) Cases arising under the National Banking Acts;

(c) Foreign corporation cases;

(d) Cases arising under *ultra vires* acts of corporations;

(e) Cases arising under the Indian Reservation Acts;

(f) The Deputy Mineral Surveyor cases.

If it be admitted that Whittren as a deputy mineral surveyor is subject to the loss of any location made by him while such surveyor (which we will concede temporarily for argumentative purposes), yet under the principles of the foregoing cases, no such loss could be asserted except in a proceeding under proper process and pleading where the Government is a party.

(a) *The Alien Cases.*

The case at bar was a purely possessory action between two individuals and not a patent proceeding, and the principle of the alien cases, so-called, was peculiarly applicable therein.

Section 2319, R. S. U. S., declares that only *citizens* and those who have declared their *intention* to become such shall locate the public mineral lands.

Notwithstanding the terms of the statute the Supreme Court has decided in two cases,

Manuel vs. *Wulff*, 152 U. S., 505;
McKinley Creek Mining Co. vs. *Alaska United M. Co.*, 183 U. S., 563,

that if some person not a citizen locates, no one can question the validity of the location but the Government.

Says this Court in the last case cited:

> "The meaning of *Manuel* vs. *Wulff* is that the location by an alien and all the rights following from such location *are voidable and not void and free from attack by any one except the Government.*"

This rule of law has long been established by the Federal Courts and courts of last resort.

Shea vs. *Nilima,* 133 Fed., 209, 215;
Tornanses vs. *Melsing,* 109 Fed., 711;
Lone Jack M. Co. vs. *Megginson,* 82 Fed., 89;
Billings vs. *Aspen M. & S. Co.,* 52 Fed., 250;
Holdt vs. *Hazard,* 102 Pac., 540.

See also,

Shamel on Mining, Mineral & Geological Law, 108;
Morrison's Mining Rights, 13th Ed., 308;
Lindley on Mines, Vol. 1, Sec. 233;
Martin's Mining Law, Sec. 98;
Costigan on Mines, Sec. 263;
Ricketts on Mines, Sec. 163-3.

Wherein does the distinction lie between an alien qualified and a citizen disqualified? Should a

harsher rule be invoked by the Courts as against a citizen than is invoked by the Government against an alien? Manifestly the United States extends its invitation to locate mineral lands to qualified citizens and inchoate citizens only. It reserves the right to prevent its bounty going to unqualified locators by proceedings on "office found." But it does not lie in the mouths of those who are desirous of being recipients of the bounty of the United States, both alien and citizens, to use the Courts as an instrument to usurp this right of the Sovereign. In such event we should have a location held void as to a disqualified citizen and valid as to a disqualified alien. *Non constat* this very condition may have been shown to exist here, if the Government had been a party to the proceeding. No question of citizenship of the parties, however, would have been permitted to be raised in this case under the pleadings therein or under the principle of the alien cases.

Is it not a *reductio ad absurdum* for the Court to so construe section 452 in a proceeding where the Government is not a party as to deny to a qualified citizen suffering from the inhibition of the statute the right to hold a mineral location, and yet to permit the *alien* suffering also from an express inhibition to *hold* such a location until the Government shall question it?

> "Certainly the statute ought not to be given an absurd or utterly unreasonable interpretation

leading to hardship and injustice if any other interpretation is reasonably possible."

St. Louis & Iron Mountain Ry. Co. vs. *Taylor,* 210 U. S., 295.

In the case of *Billings* vs. *Aspen Mining & Smelting Co.,* 52 Fed., 251, the Circuit Court of Appeals quotes approvingly the language of this Court in the early case of *Governeur* vs. *Robertson,* 11 Wheat, 332, where in discussing the policy that permits an alien to hold real estate until office found, it is said:

"It no doubt owes its present authority, if not its origin to a regard to the peace of society, and a desire to protect the individuals from arbitrary aggression."

If to disturb the possession of an alien locator is arbitrary aggression, certainly an interference with the right of a citizen holding and possessing a valid location, may be also deemed an arbitrary aggression where such interference is based on the ground that he is suffering from a disqualification such as the one complained of here.

The rule of the peace of society is as applicable in the one instance as the other.

(b) *Cases arising under the National Banking Acts.*

There is a line of cases decided by the Supreme

Court of the United States in which the principle controlling in the alien cases has been adopted and applied. We refer to those cases arising under the laws of the United States relative to the powers of the National Banks. In many of these cases, the banks have taken certain securities in the ordinary course of business in direct violation of the provisions of the Act of Congress.

But has this Court declared such securities void? On the contrary, it has uniformly held such securities enforceable by the banks, when their validity has been questioned by private persons, holding the same voidable and then *only at the instance of the Government on office found.*

National Bank vs. *Matthews,* 98 U. S., 621, 627;
Oates vs. *National Bank,* 100 U. S., 239, 249;
National Bank vs. *Whitney,* 103 U. S., 102-3;
Reynolds vs. *Bank,* 112 U. S., 405;
Schuyler National Bank vs. *Gadzen,* 191 U. S., 451.

The early case of *National Bank* vs. *Matthews,* 98 U. S., 621, 627, is a leading case upon the point.

The National Banking Act provided that the banking association created thereunder might purchase, hold and convey real estate for certain purposes and no others. It further provided for the acquisition by the banking associations, of land at

judgment sales and by several other methods, but especially prohibited the holding of any real estate under mortgage. Notwithstanding the prohibition of the statute, the Union National Bank of St. Louis took a mortgage upon certain real property to secure future advances. Upon an action brought to enjoin the sale by the bank under said mortgage, the power of the bank to accept such security was assailed and the contract alleged to be void. But this Court in holding the bank's power could not be attacked collaterally said:

> "The statute does not declare such a security void. It is silent upon the subject. If Congress so meant, it would have been easy to say so; and it is hardly to be believed that this would not have been done instead of leaving the question to be settled by the uncertain result of litigation and judicial decisions. . . . Where a corporation is incompetent to take a title to real estate, a conveyance to it is not void, but only voidable, *and the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose*" (pages 627-8). (Italics ours.)

There is a complete line of decisions of this Court based upon the foregoing authority, down to that of the case of *Schuyler National Bank* vs. *Gadsen,* 191 U. S., 451, where this Court, in approving the doctrine of *National Bank* vs. *Matthews, supra,* says:

"It is no longer open to controversy that the provisions of the Statutes of the United States forbidding the taking of real estate security by a National Bank for a debt coincidently contracted do not operate to make the security void, and thus enable the individual who has contracted with the bank to defeat recovery but simply subject the bank to be called to account by the Government for exceeding its powers" (page 458).

(c) *Foreign Corporation Cases.*

The same principle is involved in another class of cases decided by this Court wherein foreign corporations being forbidden to do business in a State or acquire property therein until they have complied with certain statutory requirements, violate the law in this respect.

In such cases this Court has uniformly held that in the absence of any provision of the statute declaring contracts made in violation of the statute void, that no one can question their validity except the sovereignty on direct proceedings instituted for that purpose.

Fritts vs. *Palmer,* 132 U. S., 282;
Seymour vs. *Slide,* 153 U. S., 523.

The case of *Fritts* vs *Palmer, supra,* is one much cited in the books.

There the question was whether a deed for real estate in Colorado made to a Missouri corporation organized to do business in the former State, but which had not filed in the office of the Secretary of State its articles of incorporation, was absolutely void, passing no title to the grantee. The statutes of Colorado had provided that no foreign corporation should purchase or hold real estate in the State unless in the manner provided by the Colorado laws, and further provided that upon failure to comply with the provisions relative to the filing of its articles, that each stockholder and officer should be liable jointly and severally on all contracts of the company while it was so in default.

This Court construing this section said:

> "The question whether a corporation having capacity to purchase and hold real estate for certain defined purposes or in certain quantities has taken title to real estate for purposes not authorized by law, or in excess of the quantity permitted by its charter, *concerns only the State within whose limits the property is situated. It can not be raised collaterally by private persons unless there is something in the statute expressly or by necessary implication authorizing them to do so.*" (Italics ours.)

In thus holding, this Court based its decision upon the fact that the principle involved was analogous to that raised in the alien cases, the National Banking cases and those cases arising out of the

ultra vires acts of domestic corporations, in all of which it has been decided that only the Government can complain.

(d) *Cases Arising Under Ultra Vires Acts of Corporations.*

Similar to the foregoing cases are those expressly cited by the Supreme Court in support of the reasoning in the case of *Fritts* vs. *Palmer, supra,* wherein corporations organized to do business under State laws are authorized by the statute to hold only a limited amount of real property.

This Court has settled the law that where a corporation violates the statute in this respect, no advantage of the fact can be taken by a private individual; that only the sovereignty can complain.

Cowell vs. *Springs Co.,* 100 U. S., 55, 60;
Jones vs. *Habersham,* 107 U. S., 174;
Blair vs. *City of Chicago,* 201 U. S., 450-1.

(e) *Cases Arising Under Indian Reservation Acts.*

There is finally one other class of analogous cases involving the throwing open of certain lands of the United States theretofore reserved to Indians, such lands to become open to settlers on a certain day at an hour stated; and wherein the proclamation of the President declaring such lands open to settlement contains an *express prohibition* against sooner entry

under penalty of loss of power to acquire any right to said lands.

Notwithstanding such prohibition, this Court has upheld locations made by individuals who violated the express provisions of the statute by entering before the hour stated, and held that where the entry of one disqualified was valid on its face, no one but the Government through its land department could question the entry.

> *McMichael* vs. *Murphy,* 197 U. S., 304;
> *Hodges* vs. *Colcord,* 193 U. S., 192.

A case strongly in point as illustrative of this principle is that of *McMichael* vs. *Murphy, supra,* decided by this Court a few years ago.

In that case the President under the Indian Appropriation Act of 1889, issued a proclamation declaring that certain lands on and after noon of April 22nd, 1889, ***and not before,*** should be open for settlement, etc., and further on in said proclamation used the following language: "Warning is hereby "again expressly given that no person entering upon "and occupying said lands before said hour . . . . "of April 22, 1889 . . . will ever be permitted "to enter any of said lands or acquire any rights "thereto; and that the officers of the United States "will be required to strictly enforce the provisions "of the Act of Congress to the above effect" (26 Stats., 1544, 1546). A man named White did enter

and occupy *before* said time, in direct violation of both the Act of Congress and the President's proclamation; he, White, thereafter made an entry thereof in the Land Office. Subsequently, one McMichael entered the same land, and on contest for it the Court said as follows:

> "Following the adjudged cases, we hold that White's original entry was *prima facie* valid, that is, valid on the face of the record, and McMichael's entry, having been made at the time when White's entry remained uncanceled or not relinquished of record, conferred no right upon him for the reason that White's entry, so long as it remained undisturbed of record, had the effect to segregate the lands from the public domain and make them not subject to entry. Upon White's relinquishment they again became public lands, subject to the entry made by Murphy."

To the same effect, that no rights can be incepted by a third party to land covered by a homestead entry, made by one disqualified in fact, until after such original entry is declared void by competent authority, is the case of *Hodges* vs. *Colcord, supra.*

We also cite to the Court the following authorities from the Circuit Courts of Appeal and the courts of last resort of the various States, in which the said doctrine laid down by this Court is adopted and followed in analogous cases:

Webber vs. *Spokane, etc.*, 64 Fed., 208;
Sanders vs. *Thornton*, 97 Fed., 863;
Brown vs. *Schlerer*, 118 Fed., 987;
Blodgett vs. *Lanyon Zinc Co.*, 120 Fed., 893;
Waterbury vs. *McKinnon*, 146 Fed., 737-9;
Dunlap vs. *Mercer*, 156 Fed., 545;
Newchatel vs. *New York*, 49 N. E., 1043;
Ledebuhr vs. *Wisconsin Trust Co.*, 88 N. W., 607, 609;
Meyers vs. *Campbell*, 44 Atl. (N. J.), 863;
Camp vs. *Land*, 122 Cal., 167.

The case of *Sanders* vs. *Thornton, supra,* while involving a somewhat different state of facts, is very pertinent. It appeared therein that a citizen of the United States, contrary to the statute, had knowingly purchased certain lands of a Cherokee Indian situate on the Cherokee domain, inducing the latter to use his name and hold the lands in trust, to evade the statute. Upon a suit in unlawful detainer, the point was made that such a purchase being in violation of the law was void, and an instruction to that effect was asked.

The Circuit Court of Appeals for the Eighth Circuit, in holding that such a purchase was not void, said:

> "If the defendant was a citizen of the United States and for that reason was not entitled to hold lands and improvements thereon in the

Cherokee Nation, these facts alone would not entitle the plaintiff to recover, as the instruction asked broadly asserts. Several other things would have to occur to entitle the plaintiff to oust the defendant. These facts might entitle the sovereign to oust the defendant but, *if the defendant was not entitled to hold lands or improvements thereon in the Cherokee Nation that is no concern of the plaintiff, and he can not profit by it in this action. The Sovereign alone, either the United States or the Cherokee Nation has the right to oust him of his possession or occupancy on that ground.*"

(f) *The Deputy Mineral Surveyor Cases.*

The cases in which the question as to whether or not a deputy surveyor can make a mineral location, so far as court adjudications are concerned, consist of but two, one decided by the Utah Supreme Court adversely to such right (*Lavignino* vs. *Uhlig*, 71 Pac., 1047), and one in favor in Nevada (*Hand* vs. *Cook*, 92 Pac., 3).

Other cases have been decided by the Land Department.

It would be needless to enter into an exhaustive examination of these Land Department decisions. Lindley in his work on mines (2nd Ed., Vol. 2, Sec. 661) sums up the status of that Department thereon as follows:

"The Land Department at one time held that

they (deputy mineral surveyors) were not prohibited from making mineral entries within the district for which they are appointed. By subsequent rulings it was determined that they came within the inhibition of section 452 of the Revised Statutes, and were prohibited from entering or becoming interested in any of the public lands of the United States. The latest expression by the Department on the subject has a tendency to suggest the incorrectness of these later rulings. The existing Land Department regulations seem to limit the disqualification of the deputy surveyor to the making of surveys or mineral claims in which he holds an interest thus intimating that he may lawfully locate and hold a claim but could not survey it for patent."

The latest ruling of the Department prior to the decision in the case of *Seymour* vs. *Bradford,* 37 Land Dec., 61 (revoking the appointment of Bradford as a deputy mineral surveyor because of his violating the provisions of the statute), is the case of W. H. Leffingwell (30 Land Dec., 139). This case shows the unsettled condition of the Land Department decisions upon this point. There it was held that where a deputy mineral surveyor who has no interest in a mining claim at the time he surveys the same nor at the date of the application for patent, but who subsequently makes entry thereof, does not come within the spirit of section 452 prohibiting employees of the General Land Office from "pur-

chasing or becoming interested in the purchase of public land."

Up to 1898 no doubt was expressed by the Land Department as to the right of a deputy mineral surveyor to make a mineral entry. It had rendered two decisions to the effect that he had such right.

In re Loch Lode, 6 Land Dec., 105;
Dennison vs. *Willitts,* 11 Land Dec., 261.

In a case reported in 26 Land Dec., 122, 136 (*Floyd* vs. *Montgomery et al.*), these decisions were reversed, the Department holding that a mineral surveyor was prohibited by the Statute from making such entry. In 1900 this latter rule was again reversed in effect, for in the Leffingwell case the Department held that where the mineral surveyor had no interest in the claim at the date of the making of the survey and the application, he might make an entry thereof subsequent.

Naturally in these Land Department cases, conflicting as they may be, the Government is a party, so that no criticism may be made of such decisions, as is made with reference to the two cases cited in Utah and Nevada, and in the decision of the Circuit Court of Appeals herein, that no one of them constituted a proceeding involving a question of "office found."

The case of *Lavignino* vs. *Uhlig* was carried to this Court, but a decision of the question in con-

troversy here was held not to be necessary in deciding the case (198 U. S., 443).

We have then no further express decisions save the one of *Hand* vs. *Cook,* the decision on review here, and the Land Decisions.

The sentiment underlying the attitude of the courts toward the decisions of the Land Department is lucidly expressed in the case of *United States* vs. *Moore,* 95 U. S., 760, 763, where the Court says:

> "The construction given to a statute by those charged with the duty of executing it, is always entitled to *the most respectful consideration, and ought not to be overruled without most cogent reasons.* . . . The officers are usually able men, and masters of the subject; not infrequently they are the draftsmen of the laws they are afterwards called upon to interpret."

But again says the Court:

> *"It is only when those officers have misconstrued the law, applicable to the case, as established before the department, and thus have denied the parties rights which, upon a correct construction would have been conceded to them,* or where misrepresentations and fraud have been practiced, necessarily affecting their judgment, that the courts can in a proper proceeding interfere and refuse to give effect to their action."

Quinby vs. *Conlon,* 104 U. S., 420, 426.

See also,

Hastings & Dak. R. R. Co. vs. *Whitney,* 132 U. S., 357, 366.

In the early case of *United States* vs. *Dickson,* 15 Pet., 161, the Treasury Department had for more than *twenty years* placed a certain construction upon an Act of Congress. This Court declined to follow the construction, saying:

> "The construction so given by the Treasury Department to any law affecting its arrangements is certainly entitled to great respect. *Still, however, if it is not in conformity to the true intendment, and provisions of the law, it can not be permitted to conclude the judgment of a court of justice."*

The Circuit Court of Appeals in the case at bar, based its decision in part upon the Lavignino-Uhlig case, and in part upon the case of *Prosser* vs. *Finn,* decided by this Court (208 U. S., 67).

We have no fault to find with the case of *Prosser* vs. *Finn,* however much we may differ with the conclusion of the Circuit Court of Appeals that a deputy surveyor is an employee of the Land Office of the same status as that of a special agent. A deputy surveyor lacks the first essential of such employment—the rendition of services to the Government for pay from the Government; while a special agent is in the actual service of the United States

receiving his compensation therefrom, the surveyor is in the service of the party who employes him to make a survey and is paid by him alone. He gets nothing from the United States.

That case is an instance of the principle we submit should have been controlling here, for therein the United States was a party to the original proceedings in the Land Office and necessarily with all others bound by its judgment.

II.

THE CIRCUIT COURT OF APPEALS ERRED IN FAILING TO APPLY THE DOCTRINE CONTROLLING IN THE CASE OF INNOCENT PURCHASERS.

If the doctrine laid down in the foregoing cases is applicable, and until the Sovereign power acts no one can take advantage of the alleged disqualifications of Whittren, how much more so would this apply to the innocent purchasers from him, in the persons of Eadie and Waskey. Eadie bought a half interest from Whittren in 1905 (fol. 88), and thereafter they joined in a lease to Waskey of a portion of the ground (fol. 10), and Whittren made a subsequent lease of the remainder of the ground to Waskey and Eadie (fol. 13), who in good faith continuously worked the ground thereunder (fol. 91).

By the action of the lower Court all rights of these innocent parties are ignored.

In the opinion of the lower Court a title incepted wrongly is forever incapable of being "cured." Therefore these innocent purchasers had no rights in the ground and punishment is dealt out to them although the statute under which the decision is rendered fixes but one penalty, and that is the *violator be removed from office.*

The statute says he who *directly* or *indirectly* purchases. Therefore in the opinion of the lower Court a secret location in favor of a deputy mineral surveyor would be void, and if void, innocent purchasers for value would have their investment confiscated, *not* by the Government, who would deal equitably, but by the individual who "jumps."

To illustrate, suppose Whittren had been employed by Chambers to locate mines in Whittren's name. Chambers was a mineral surveyor; Whittren was not. Chambers desires the mine. Whittren does locate it and Eadie and Waskey purchase from Whittren without any knowledge that Whittren is acting for Chambers, a deputy mineral surveyor. The innocent purchasers for value (when the secret is exposed that Whittren is acting for Chambers, the deputy mineral surveyor), lose their purchase. Can that be law?

Certainly the United States Government never intended to pass a law that the property of the innocent should be forfeited and confiscated?

The situation is somewhat akin to a vendor's lien.

Still the vendor has no lien against an innocent purchaser.

Bailey vs. *Greenleaf,* 7 Wheat., 46.

There is no record open to the public of the appointment of Chambers as a mineral surveyor. There is nothing to notify the public not to deal with Chambers. If there was a record that Chambers was a mineral surveyor, Chambers has conspired with Whittren to locate secretly and therefore the public had no notice. Remember, the statute all the time is in words that the punishment shall fit the crime, i. e., that the person who violates "shall forthwith be removed from his office."

Look at the facts for a moment. It is conceded by the Circuit Court of Appeals that the original location of Whittren while slightly in excess of twenty acres was valid. He had conformed to the statute in the two essential requirements, viz: made a discovery and marked his boundaries so that the location could be readily traced. No notice is required to be recorded by the laws of Alaska.

Sturtevant vs. *Vogel,* 167 Fed., 448.

The location was then complete.

Erwin vs. *Perigo,* 93 Fed., 608.

The fact that the claim exceeded in area the statutory amount simply rendered that *excessive area* void.

Price vs. *McIntosh,* 121 Fed., 716;
Zimmerman vs. *Funchion,* 161 Fed., 859;
Hammer vs. *Waskey,* 170 Fed., 31;
Richmond vs. *Rose,* 114 U. S., 576.

And even as to this void excess Whittren had the sole and first right to say where and how he should cut it off. He was not compelled to cast it off until some one had complained and then could use his judgment as to what portion should be eliminated.

Price vs. *McIntosh, supra;*
Zimmerman vs. *Funchion, supra.*

After having been in possession of his valid location for a year and a half, Whittren decided to survey it. In drawing in his lines in an honest endeavor to comply with the law, he excluded the point within his original stakes at which he had made a discovery. No one had questioned his excess. He found he had too much, and adjusted the lines in a manner to give him the legal quantity of ground and at the same time be a satisfactory area to himself and in so doing, according to the decision of the Court below, placed himself outside the law, as he was then a deputy surveyor, having been appointed between the time of making his first discovery and this innocent readjustment of boundaries. At this time he panned within these readjusted boundaries and found gold.

Subsequently, Eadie and Waskey having no means

of knowing, constructively or otherwise that the location had been invalidated by the endeavor to comply with the law, innocently purchased and in good faith proceeded to develop the ground.

Furthermore the United States has provided no means of declaring to the world that such a location is *void.* The language of the statute on its face, interpreted in the light of the decisions of this Court upon questions of statutory construction, would hold to the contrary.

Assuming then that a deputy surveyor is within the provisions of section 452, and that Eadie and Waskey had knowledge of that fact, by a *presumed* knowledge of the existence of the statute, what conclusions could they arrive at as to the penalty to be derived from the working of such a location by him? Does the statute say that any such location shall be *void?* No. It says that the persons therein named are "prohibited from purchasing" any of the public lands, and if they violate the statute, *they shall forthwith be removed from office.*

> "Where a statute specifies the effect (of a violation) of a certain provision, courts will presume that *all* of the effects intended by the law maker are stated."
>
> *Sutherland on Statutory Construction,* Sec. 324.

"Where a statute specifies the effect of a certain provision *other effects are to be held excluded.*"

Endlich on Interpretation of Statutes, Sec. 397.

"Where the law maker assumes himself to set out the consequences of disobedience to the law, no other consequences can be logically or fairly considered as coming within the scope of his intention. If he attempts to set out such consequences, he must be presumed from the very nature of the thing *to intend to complete his work and not to leave it unfinished.*"

Bird vs. *Pennison,* 7 Cal., 308.

The law seems to be well settled that where a statute creates a new offense, and announces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can only be that which the statute prescribes.

Sutherland on Statutory Construction, Sec. 327;
Endlich on Interpretation of Statutes, Sec. 397.

Says this Court in *Fritts* vs. *Palmer, supra:*

"So far as we are aware, the only penalty imposed by the statutes of Colorado upon a foreign corporation carrying on business in the State

before acquiring the right to do so, is found in section 262 of the same chapter. . . . *The fair implication is that in the judgment of the Legislature of Colorado, this penalty was ample to effect the object of the statutes prescribing the terms upon which foreign corporations might do business in that State It is not for the judiciary at the instance or for the benefit of private parties claiming under deeds executed by the persons who had previously conveyed to the corporation according to the forms prescribed for passing title to real estate, to inflict the additional and harsh penalty of forfeiting for the benefit of such parties the estate thus conveyed to the corporation and by it conveyed to others."*

Says the Circuit Court of Appeals for the Eighth Circuit, in *Dunlap* vs. *Mercer,* 156 Fed., p. 545.

"The general rule that an illegal contract is void and unenforceable is, however, not without exception. It is not universal in its application. It is qualified by the exception that where a contract is not evil in itself, and its invalidity is not denounced as a penalty by the express terms of or by rational implication from the language of the statute which it violates, and *that statute prescribes other specific penalties it is not the province of the courts to do so, and they will not thus affix an additional penalty not directed by the law making power."*

If then these innocent purchasers were assumed

to know the law, no other conclusions could have been arrived at by them than,

(1) Assuming that loss of employment was specifically named as a penalty in the statute, the courts could prescribe no further penalty;

> "On what principle of law could this court add another to the penalties prescribed by the law itself?"

De Wolf vs. *Johnson,* 10 Wheat., U. S., 392.

or

(2) If loss of employment (the consequence provided by the statute) was not to be regarded as the exclusive penalty, and the courts could by construction assume that Congress designed a further penalty, there could be none greater than by making the location voidable, and that under the rules laid down by this court in the cases cited under our first point could only be at the instance of the sovereign power. Subject to such possibility alone, Eadie and Waskey may be said to have purchased.

There had been no adjudication upon the point by this court, and conceding that these grantees would be assumed to know the law, the natural deduction they would draw would be in line with the alien cases and the other analogous cases cited; that only the government could complain, and that the

location could not be the subject of collateral attack by a private individual.

This would seem to be the conclusion of Costigan as expressed in his work on mining law, page 170, wherein, commenting upon the two cases cited and emphasizing this doctrine of innocent purchasers he says, referring to *Lavagnino* vs. *Uhlig* (71 Pac., 1046):

> " . . This is but a state decision for the United States Supreme Court, when the case came before it, avoided the point by basing its decision on the ground that the land was not open to location. The whole tenor of the Utah decision is that the location by the deputy mineral surveyor is absolutely void, ***whereas the protection of innocent purchasers requires that a rule like that applicable to locations by aliens be applied.*** It is upon this ground only that a recent Nevada decision upholding a location by a deputy mineral surveyor can be supported. While the court seems to have been in error in the last-mentioned case in saying that deputy United States mineral surveyors are not covered by the above-mentioned statute, ***nobody but the government could possibly object to a location by a deputy mineral surveyor,*** and the court was therefore right in its decision, but erred in the reason given for it."

Presumption is Discovery Extends Throughout Location.

There is still another proposition involved here that the court below lost sight of and that is the presumption that when discovery is made and boundaries marked, that the mineral extends throughout the length and breadth of the claim, validating every portion thereof. Too much stress is laid upon the fact that Whittren left his point of discovery outside of his readjusted lines.

He never intended to abandon his discovery when he surveyed the claim and drew in the lines in order to obey the law. His ground was in the midst of and lying over a great gravel deposit and the continuance of that gravel with the auriferous minerals therein from the hole in which he found the gold in 1902 throughout the entire claim was to be presumed under the decision of the courts.

When one has discovered a lode upon the unappropriated public domain and has within the proper time in good faith, performed all of the subsequent acts essential to a valid location, as provided by law, he is entitled to the presumption that his lode extends through the full length of the claim.

Armstrong vs. *Lower,* 6 Colo., 393;
Patterson vs. *Hitchcock,* 3 Colo., 533.

And it has been held by this Court as well as by the Circuit Court of Appeals that in deciding whether a discovery has been made or not the fact that the location lies in close proximity to other

claims whereon minerals have been developed is a factor that may be taken into consideration.

Erhardt vs. *Boaro,* 113 U. S., 536;
Lange vs. *Robinson,* 148 Fed., 799;
Shoshone vs. *Rutter,* 87 Fed., 807.

The record shows that the "Bon Voyage" was surrounded by mineral bearing claims, namely the "Golden Bull" and others.

Applying this same doctrine to this placer claim, why should not the presumption attach that these auriferous gravels extend throughout the length and breadth of the claim?

Where the locator of a mining claim extends or changes his boundaries by an amended location, he is not required to make any discovery of ore in the ground so added, as it becomes a part of the original claim and is validated by the original discovery,

Tonopah & Salt Lake Min. Co. vs. *Tonopah Min. Co.,* 124 Fed., 389.

In the case of *Little Pittsburgh Consolidated Min. Co.* vs. *Amie Min. Co.,* 17 Fed., 57, where it was held that after a mining claim has been validly located the owner of it may sell any part of it without prejudice to his right to hold the remainder, Judge Hallett said with reference to the fact that the por-

tion disposed of included the discovery point on the location:

> "The position taken appears to be to the effect that one who owns a mining claim must at all events hold on to his discovery shaft until he has obtained a patent for his claim. If he yields it to another in any way by conveyance *or otherwise,* he thereby abandons the rest of his claim. I do not see upon what principle such a conclusion can rest. *After the claim has been properly located the owner of it may sell any part without prejudice to his right to hold the remainder. He may dispose of it by gift or grant in any way that seems proper to him.*"

In the case of *Silver City Gold & Silver Min. Co.* vs. *Lowrie,* 57 Pac., 11, the Supreme Court of Utah, commenting on this decision of Judge Hallett, said:

> "If a mining claim is, as in practice most of them are, held by tenants in common, under the laws of most if not all of the mining States they may petition for partition. If upon partition of a claim a portion should be set off to one of the parties on which the original discovery was not located, under the rule insisted upon by appellants, he would lose all of his rights, notwithstanding the lode might exist, and have been developed and worked through the whole length of the claim. The cases upon which the appellants rely do not sustain their contention, because the facts involved in them were radically different from the facts in the case at bar. Chief

Justice Waite indicates in the case of *Gwillim* vs. *Donnelan, supra,* that if it had appeared that a discovery had been made at any place on the defeated claim, other than the original discovery which was within the patented ground, the right to the portion of the ground outside of the patent would not have been lost."

And again says the Utah Supreme Court in the same case:

"The Land Department holds that where a portion of a claim embracing the original discovery is lost or is waived or omitted from the application, a patent will be issued for the balance, provided that the vein has been discovered and developed on the portion of the claim not omitted (Secretary Teller to Commissioner, 1 Land. Dec., Dept. Int., 593). The Commissioner of the Land Department having asked the Secretary this question: 'Did the waiver of the discovery shaft and the portion of the lode within the Kangaroo survey by failure to adverse the claim have the effect to vitiate the entire Metropolitan location and bar an application for any part of the same?' The Secretary in answer said, 'On the first point I am of the opinion that the development and possession of the lode so far as it runs upon public land, was not interfered with in any manner by the waiver of a portion even though the original discovery shaft was included in the portion disposed of. The continued possession and working of such outside portion under the original ownership

and location ought not to be held as forfeited while the good faith of the owner towards the United States is not impaired; *and opportunity should not be given to a stranger to appropriate under United States laws the property and improvements which he has acquired and made upon a good and sufficient location properly asserted by him, at the time of the original discovery.* Section 2326 of the Revised Statutes recognizes portions of claims as entitled to patent, and the issue of separate patents on such portions as adverse parties may rightfully possess. Assignment of any interest whatever on these mining possessions has been declared valid by the Supreme Court even by a parol transfer without a written instrument. If the existence of the lode be shown beyond the lines of the conflicting survey, and application be made for patent, it would seem to work a complete abrogation of a property and statutory right to deny a patent thereon because of a sale or surrender of some other portion of the lode originally embraced in the discovery and location.' See also Spur Lode, 4 Land Dec., 160; Cayuga Lode, 5 Land Dec., 703."

In Alaska there is no provision for a discovery shaft as a condition precedent to the completion of a valid location as is the case in some of the States and Territories. The loss of this original hole then was immaterial. Whittren made a discovery within the limits of the claim as originally located. The location when completed vested in him a right to

the exclusive possession of the entire location as against everybody but the Government and until he learned that he had included an excessive area and then it was void only as to the excessive area.

Suppose that upon an action brought to settle the right of possession of a mining location where the discovery point was near the outer boundaries of the claim over which a subsequent locator had laid his lines, the Court finds the area excessive and the original discoverer entitled to only the statutory amount, the balance of his claim covering his discovery point being awarded to his adversary, the subsequent locator, would the remainder of the original claim be held void for lack of discovery, the locator having done no work showing that there was mineral in the claim? On the contrary would not the presumption that the mineral extended throughout the limits of the claim by reason of the original discovery be invoked in favor of its validity?

On the other hand let us assume that Whittren sells a portion of his claim taking in the twenty feet drawn off and including his discovery point. Can it be said because he has thus sold a portion of the ground covering his discovery point that no rights remained in him by reason of the balance of the claim being without such discovery point? We hardly think that it would be so held and in fact Judge Hallett in the case of *Little Pittsburgh Con-*

solidated M. Co. vs. *Amie M. Co.,* hereinabove cited, says that is not the law.

The case of *Gwillim* vs. *Donnelan,* relied upon by the Circuit Court of Appeals in its decision, does not seem to us to be applicable to the facts here. In *Gwillim* vs. *Donnelan* there never was in the eyes of the law a discovery by a qualified locator. The discovery was, it was admitted, made upon an adjoining claim and not within the lines of the location staked. Under the statute the first discovery must be within the lines of the location. There was therefore no discovery within the monuments upon *vacant land* upon which to support the location in the *Gwillim* vs. *Donnelan* case. Here there was undoubtedly a valid location made, based upon sufficient discovery *within* the lines of the location.

If Whittren before he surveyed the ground had disposed of the claim he would have disposed of a valid location, a discovery having been made within the limits thereof. If, called upon as a deputy surveyor to make a survey of the claim he discovered before the year for the doing of the annual assessment work has expired, that the claim was excessive and was directed by the purchaser to draw in its lines to conform to law, and did so draw in the lines in the same manner as was done in this case by excluding the discovery point, can it then be said that it would be incumbent upon the innocent purchasers of the validly located claim, to make another dis-

covery upon their claim within the readjusted lines? or would not the presumption be applied that once validated by discovery such validity could not be removed by an exclusion of a small hole in the ground wherein gold had been originally discovered? We contend no such unreasonable rule of law as first suggested could be applied to such purchasers and why exercise in favor of subsequent parties a principle which is denied the original locator who has by his energy and enterprise marked out of the public domain a mining claim and perfected the same by discovery; and which is also denied by the decision in this case to those who purchase subsequent to the readjustment of the boundaries as is shown herein. No protection whatever then is afforded to innocent purchasers under this decision although it is well settled that an innocent purchaser may be in a somewhat different position than would be the original locator.

This was early laid down as a matter of mining law by Judge Hallett in the case of *Harris* vs. *Equator Mining & Smelting Co.*, 8 Fed., 863, where he says:

> "It is clear that a *purchaser* may be in a different position from the locator of the claim *not as against the general government with which nothing can avail, but strict compliance with the law regulating locations,* but as against other citizens seeking to locate the same ground. It may

well be said that a purchaser in possession under a conveyance regular in form is in by color of title which in time under the statute of limitations will ripen into a perfect right and it seems reasonable to allow him to maintain his possession and his right against one who seeks only to initiate a new claim to the same thing. In doing so the regulations respecting locations are not at all relaxed nor is any condition on which the estate is held set aside. A presumption is indulged in that the location was regularly made in the first place and the party in possession is allowed to remain so long as he shall comply with the conditions on which he holds the estate. The circumstance that a miner's estate in the public lands is subject to conditions on failure of which it will be defeated is not controlling. In general we apply to the mines or public lands the rules applicable to real property as that it may be conveyed by deed, is subject to sale on execution as land, descends to the heir of the claimant and not to the personal representative of his estate, and so on. No reason is perceived for denying the force and effect of the rule under consideration as applicable to such property."

Under the Alaskan Code a leasehold interest for a period of years is an interest in land or real estate, and if it covers a term of more than a year the conveyance thereof must be in writing.

By section 136, part IV, chapter 15, *Carter's Ann'd Code,* it is provided that "The term 'conveyance'

"as used in chapters 13, 14 and 15 of this title, "shall be construed to embrace every instrument in "writing except a last will and testament, whatever "may be its form and by whatever name it may be "known in law, by which any estate or interest in "lands is created, aliened, assigned or surrendered."

Section 135 provides:

"The term 'lands' as used in chapters 13, 14 and 15 of this title, shall be construed as co-extensive in meaning with 'lands, tenements and hereditaments,' and the term 'estate and interest in lands' shall be construed to embrace every interest, freehold and chattel, legal and equitable, present and future, vested and contingent in lands as above defined."

Section 181, part V, provides:

"The term 'real property' includes all lands, tenements and hereditaments and rights thereto and all interest therein, whether in fee simple or for the life of another."

Section 1046 of part IV provides:

"No estate or interest in real property other than a lease for a term not exceeding one year, nor any trust or power concerning such property, can be created, transferred or declared otherwise than by operation of law or by a conveyance or other instrument in writing, subscribed by the party creating, transferring or declaring the same, or by his lawful agent under written

authority, and executed with such formalities as are required by law."

A mining lease moreover is a grant of the mineral in the ground. It is a conveyance of the very substance of the location, subject to an exception of an amount sufficient to pay the royalties thereon to the grantor.

2 *Lindley on Mines,* pp. 1578 to 1581;
Tiffany Landlord and Tenant, 1018;
Gowan vs. *Christie,* L. R. 2 H. L., Sc. 273, 284;
Coltness Iron Co. vs. *Black,* 6 App. Cas., 315, 335;
Fairchild vs. *Fairchild* (Pa.), 9 Atl., 255;
Duff's Appeal, Wkly. Notes Cas. (Pa.), 491;
McDonald Stone Co. vs. *Stern,* 38 So., 641;
Scotch & D. Appeals, L. R. pp. 273, 283, 284;
Con. Coal Co. vs. *Peers* (Pa.), 37 N. E., 978;
Hope's Appeal, 3 Atl., 23.

These lessees, therefore, came within the doctrine of innocent purchasers.

The decision in this case by the Circuit Court of Appeals is diametrically opposed to the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *Sanders* vs. *Thornton,* hereinbefore

cited. The principle controlling in both cases is identical. The ground belongs to the sovereignty in each case; certain persons are disqualified to purchase in each case; both violate the provisions of the statute.

"But only the Government can complain," says the Circuit Court of Appeals for the Eighth Circuit, and "any one can complain," says the Circuit Court of Appeals in the case at bar.

We submit that the decision in *Sanders* vs. *Thornton* exhibits the true rule which should have controlled in this case, not alone as applicable to Whittren as a deputy surveyor, but more strongly so because of the conveyances to the innocent purchasers in this case. If only for the protection of innocent purchasers the investigation into the validity of such a location should be left to the Government, who can afford to be as generous to innocent parties purchasing a mining location as are the courts to innocent purchasers of other kinds of real property.

III.

A DEPUTY MINERAL SURVEYOR IS NOT EITHER AN "OFFICER, CLERK OR EMPLOYEE" IN THE GENERAL LAND OFFICE.

Section 452 of the Revised Statutes of the United States upon which is based the grounds for declar-

ing the mineral location in this case void because made by a deputy mineral surveyor, is as follows:

> "The officers, clerks and employees in the General Land Office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public land, and any person who violates this section shall forthwith be removed from, his office."

This section arises out of the original prohibition against the purchase of public lands by employees in the General Land Office which is found in the Act of April 25, 1812, "for the establishment of a General Land Office in the Department of the Treasury" (2 Stats., 716). By section 10 of that Act it is prescribed that:

> "No person appointed to an office instituted by this Act or employed in any such office, shall directly or indirectly be concerned in the purchase of any right, title or interest in any public land either in his own right or in trust for any other person, or in the name or right of any other person in trust for himself, nor shall take or receive any fee or emolument for negotiating or transacting the business of the office; any person offending in the premises against the prohibitions of this Act shall forfeit and pay one hundred dollars and upon conviction shall be removed from office."

Thereafter the Act of July 4, 1836, was passed

"to reorganize the General Land Office" (5 Stats., 107).

It is therein provided (section 14) that:

> "All and every of the officers whose salaries are hereinbefore provided for are hereby prohibited from directly or indirectly purchasing or in any way becoming interested in the purchase of any of the public lands; and in case of a violation of this section by such officer, and on proof thereof being made to the President of the United States, such officer so offending shall be forthwith removed from office."

It will be noted that both the Act of April 25th, 1812, and the Act of July 4th, 1836, relate only to the General Land Office at Washington, which is invested with administrative power over the public lands and the officers and employees of that department. These Acts do not include registers, receivers, surveyors general or other local officers of the Land Department which officers had been known to the land system of the United States for many years and with which Congress had been familiar, having provided for the compensation of such officers and the employees therein.

In the provisions of this Act covering the public lands, which we have hereinbefore set forth, it will be seen there is provided for certain officers, clerks and employees, whose salaries and duties are fixed. They are all employed *in the General Land*

Office. That office is at Washington, D. C. For the Circuit Court of Appeals to hold that a deputy mineral surveyor appointed to survey mining claims in the District of Alaska is within the purview of the Act is at the very outset to do violence to its terms. To hold such section so applicable it would be necessary to construe the word "in" as meaning the same as "of," and then to declare that a surveyor appointed to survey mining claims, while not an employee in the General Land Office *is an employee "of" that office.*

Whatever doubt there might be about the express language of section 452 is cleared by reference to the language of the Act of 1836, which in terms confines the prohibition to those persons drawing *salaries* for duties to be performed within the limits of the *General Land Office* at Washington. It will be noted in section 452 the prohibition is limited to persons "in the General Land Office."

The case of *Hand* vs. *Cook,* decided by the Supreme Court of Nevada and reported in 92 Pac., 3, in discussing the section in controversy upon the question of its applicability to the deputy mineral surveyor, uses the following language:

> "Had the language of section 14 been incorporated into the Revised Statutes without change of verbiage, it is difficult to conceive of its receiving the interpretation given by some of the land decisions to the provisions of section 452

of the Revised Statutes, no matter what that Department may have thought of the wisdom of such construction. The Act of June 27, 1866, 'an Act to provide for the revision and consolidation of the statute laws of the United States' (14 Stat., 74), did not authorize the commission to change the meaning of a statute. The statute provided that 'the commission shall bring together all statutes and parts of statutes which from similarity of subject ought to be brought together, omitting redundant or obsolete enactments and making such alterations as may be necessary to reconcile the contradictions, supply the omissions and amend the imperfections of the original text.' In the case of *Logan* vs. *U. S.*, 144 U. S., 302, 12 Sup. Ct. Rep., 612, 36 L. Ed., 427, it was held that it is not to be inferred that Congress in revising the statutes intended to change their effect unless an intention to do so is clearly expressed. To the same effect see the cases of *U. S.* vs. *Ryder,* 110 U. S., 739; *McDonald* vs. *Hovey,* 110 U. S., 629; *Stewart* vs. *Kahn.*

. . . . . .

It has also been held by the same Court upon numerous occasions that in construing revised statutes where a doubt arises it is admissible to resort to its connection in the Act of which it was originally a part. . . . The same Court has also held that reference to the original statutes can not be had to control the Revised Statutes when the meaning thereof is plain. . . .

"Can it be said that it is plain from the provisions of section 452 of the Revised Statutes that the provisions thereof were intended to ap-

ply not only to the officers, clerks and employees in the General Land Office at Washington, but also to apply to the officers, clerks and employees of the office of the various United States Surveyors General in the various States and Territories? And if it can not be so said will such a construction be aided by a reference to section 14 of the Act of 1836, *supra?* We think it quite clear that if it is a proper case for recurrence to the latter Act to construe the section in question, so broad an interpretation can not be made."

It was some sixty years after the passage of section 452 as embraced in the Act concerning "The General Land Office" that Congress passed section 2319 of the Revised Statutes of the United States. That section provides:

"All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase and the lands in which they are found, to occupation and purchase by citizens of the United States and those who have declared their intention to become such under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts so far as the same are applicable and not inconsistent with the laws of the United States."

Act of May 16, 1872, c. 152 and Sec. 1, 17 Stat., 91.

It was provided by section 2207, embraced within the Act of May 10th, 1872, that the President should appoint surveyors general for certain States and Territories and thereafter a surveyor general for the District of Alaska was appointed by the President in accordance with the provisions of the Act of May 17, 1884, whereby Alaska was made one surveying district.

It is further provided by section 2334, also embraced within the said Act, that

> "The Surveyor General of the United States may appoint in each land district containing mineral lands, as many competent surveyors as shall apply for appointment to survey mining claims. *The expense of the survey of vein or lode claims and the survey and subdivision of placer claims into smaller quantities than 160 acres, together with the cost of publication of notices, shall be paid by the applicants and they shall be at liberty to obtain the same at the most reasonable rates; they shall also be at liberty to employ any United States Deputy Surveyor to make the survey.* The Commissioner of the General Land Office shall also have power to establish the maximum charges for surveys and publication of notices under this chapter; and in case of excessive charges for publication he may designate any newspaper in a land district where mines are situated for the publication of mining notices in such district and fix the rates to be charged by such paper, and to the end that the

Commissioner may be fully informed on the subject, each applicant shall file with the Register a sworn statement of all charges and fees paid by such applicant for publication and surveys, together with all fees and moneys paid the Register and the Receiver of the Land Office, which statement shall be transmitted with the other papers in the case to the Commissioner of the General Land Office."

In conformity to the provisions of section 2334 giving to the Surveyor General of the United States the power to appoint "as many competent surveyors as shall apply for appointment to survey mining claims," the General Land Department prepared certain regulations which were pertinent to the appointment of such deputy mineral surveyors and these regulations prevailing at the time Whittren was a deputy mineral surveyor, are very lengthy and are set forth in the General Mining Circular of December 18, 1903 (31 L. D., 453, 489; 32 Id., 367).

It will be noted that until the passage of the general mining laws of 1872, which included section 2334, there had never been any such position as that of a United States deputy mineral surveyor. Prior to that time any one claiming a lode and desiring to make a mineral entry had to prepare his own diagram. By the Act of 1872, section 2325, a mineral entryman was obliged to file with his application for a patent "a plat and field notes of the

"claim . . . made by or under the direction "of the United States Surveyor General . . ., "showing accurately the boundaries of the claim ". . ."

Under the provisions of Section 2334, deputy mineral surveyors who had been appointed and were within the district, were deemed proper parties to make the field notes and plat, and were so designated when the applicant made his entry, but no schedule of fees was fixed by the Government or by any regulation of the Department for the payment of his services in the matter, which were purely a matter of contract between him and the entryman.

As is provided by subdivision 120 of the regulations referred to, neither the Surveyor General nor the Commissioner of the General Land Office has jurisdiction to settle differences relative to the payment of charges for field work between mineral surveyors and claimants. These are matters of private contract and must be enforced in the ordinary manner, i. e., in the local courts.

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gate charges affecting the official action of deputy mineral surveyors, and will, on sufficient cause shown, suspend or revoke their appointment."

A deputy mineral surveyor has no duties whatever to perform outside of the surveying of the mining claims owned by private parties by whom he is employed. He does no work for the Government. He has no access to the official records of the Surveyor General's Office any further than that which is afforded to any private individual. The statute does not require an oath of office or a bond, although as a matter of Departmental regulation (General Circular, 1903, "93" 31 L. D., 453, 489, 32 Id., 367), a bond and an oath as to the correctness of the surveys so as to ensure the accuracy of the work if possible is required.

The case of *Hand* vs. *Cook, supra,* expresses concisely the character of the duties and obligations of deputy mineral surveyors as follows:

"Deputy mineral surveyors are appointed without limit and for no particular time by the Surveyor General of the United States, under the provisions of section 2334, Revised Statutes, *supra.* They are not required to keep an office in any particular place or at all. They do not remain under the direction or supervision of the Surveyor General. They are not obliged to perform any service either for the government or any individual. They are simply persons who

have been designated as having the requisite qualifications to make a proper survey of mining claims. If they perform any services at all it must be as a matter of private contract between themselves and the mining claimant. They receive no salary or compensation whatever from the Government, nor does the Government supply them with instruments or assistants while engaged in making the mining survey. They have no access to the official records of the Surveyor General's office other than that afforded any private citizen. A deputy mineral surveyor may never make a survey after his appointment or he may make fifty or more in a year. The duties of a mineral surveyor are exclusively professional and in no sense those of a clerk. He keeps no records or accounts. He registers no acts of any superior. He has no custody of public property or papers. His duties consist, when employed by the owner of a mining claim, in making for such owner a survey thereof, showing improvements thereon with preliminary plat and field notes of survey. When the field notes and preliminary plat of survey have been filed with the Surveyor General, his duty in the premises is ended except it be to correct an error made by him."

It is therefore our contention that a deputy mineral surveyor does not come within the provisions of section 452 of the Revised Statutes in that he is neither an officer, clerk or employee of the Government.

(A) *A deputy mineral surveyor is not an "officer" within the provisions of section 452, in that he can not be held to be an officer of the United States.*

> "An office is a public station or employment conferred by the appointment of Government. The term embraces the idea of tenure, duration, emolument and duties."
>
> *United States* vs. *Hartwell,* 6 Wall., 385.

The case of the *United States* vs. *Germaine,* 99 U. S., 508, is the leading case on what constitutes a Federal officer, and was relied upon by the Nevada Supreme Court in arriving at its conclusions that a deputy mineral surveyor was not an officer within the meaning of the statute.

In that case the defendant had been appointed by the Commissioner of Pensions to act as surgeon under an Act of Congress known as section 4777 of the Revised Statutes, providing that the Commissioner of Pensions would have the power at his discretion to appoint civil surgeons to make the periodical examination of pensioners which might be required by law, and to examine applicants for pensions, whenever the Commissioner deemed the services of a surgeon necessary. The fee for such examinations is provided by said law to be paid by the agent for paying pensions in the district in which the pensioner or claimant resided out of any money appropriated for the payment of pensions

under such regulations as the Commissioner of Pensions might prescribe.

Germaine was indicted in the District of Maine for extortion in taking fees from pensioners to which he was not entitled, under the provisions of section 12 of the Act of 1825, providing that "every *officer* of the United States who is guilty of extortion under color of his office shall be punished," etc.

In holding that Germaine was not an officer of the United States, this Court uses the following language:

> "The Constitution for purposes of appointment very clearly divides all its officers into two classes. The primary class requires a nomination by the President and confirmation by the Senate. But foreseeing that when offices became numerous, and sudden removals necessary, this mode might be inconvenient, it was provided that, in regard to officers inferior to those specially mentioned, Congress might by law vest their appointment in the President alone, in the courts of law, or in the heads of departments. That all persons who can be said to hold an office under the Government about to be established under the Constitution were intended to be included within one or other of these modes of appointment there can be but little doubt."

And again:

> "If we look to the nature of defendant's employment, we think it equally clear that he is

not an officer. In that case the Court said, the term embraces the ideas of tenure, duration, emolument and duties, and that the latter were continuing and permanent, not occasioned or temporary. In the case before us, the duties are *not* continuing and permanent, and they *are* occasional and intermittent. The surgeon is only to act when called on by the Commissioner of Pensions in some special case, as when some pensioner or claimant of a pension presents himself for examination. He may make fifty of these examinations in a year, or none. He is required to keep no place of business for the public use. He gives no bond and takes no oath, unless by some order of the Commissioner of Pensions, of which we are not advised.

"No regular appropriation is made to pay his compensation, which is two dollars for every certificate of examination, but it is paid out of money appropriated for paying pensions in his district, under regulations to be prescribed by the Commissioner. He is but an agent of the Commissioner, appointed by him, and removable by him at his pleasure, to procure information needed to aid in the performance of his own official duties. He may appoint one or a dozen persons to do the same thing. The compensation may amount to five dollars or five hundred dollars per annum. There is no penalty for his absence from duty or refusal to perform, except his loss of the fee in the given case. If Congress had passed a law requiring the Commissioner to apopint a man to furnish each agency with fuel at a price per ton fixed by law

high enough to secure the delivery of the coal, he would have as much claim to be an officer of the United States as the surgeons appointed under this statute."

In the later case of *United States* vs. *Mouat,* 124 U. S., 303, 307, this Court cites approvingly the case of *United States* vs. *Germaine* on this point, where it says:

"What is necessary to constitute a person an officer of the United States in any of the various branches of its service has been very fully considered by this Court in *United States* vs. *Germaine,* 99 U. S., 508. In that case it was distinctly pointed out that under the Constitution of the United States, all its officers were appointed by the President by and with the consent of the Senate, or by a court of law, or the head of a department; and the heads of the departments were defined in that opinion to be what are now called the members of the Cabinet. Unless a person in the service of the Government, therefore, holds his place by virtue of an appointment by the President or by one of the courts of justice or heads of departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States."

To the same effect see *United States* vs. *Smith,* 124 U. S., 525, 532, where a clerk in the office of the Customs was held not to be an officer of the

United States. This Court again reiterates the decision in the Germaine case, and says:

> "An officer of the United States can only be appointed by the President, by and with the advice and consent of the Senate or by a court of law, or the head of a department. A person in the service of the Government who does not derive his position from one of these sources, is not an officer of the United States in the sense of the Constitution. This subject was considered and determined in the *United States* vs. *Germaine,* 99 U. S., 508, and in the recent case of *United States* vs. *Mouat, ante,* 303. What we have here said is but a repetition of what was there authoritatively stated."

(B) *A deputy mineral surveyor is not a "clerk in the General Land Office."*

> "A clerk is one employed in an office, public or private, for keeping records and accounts, whose business it is to write or register in proper form the transactions of the persons, tribunal or body for which he is clerk."
>
> *Bouvier Law Dictionary;*
> *People* vs. *Fire Commissioners,* 73 N. Y., 437, 442;
> *People ex rel Satterlea* vs. *Board of Police Comm.,* 75 N. Y., 38.

It can not be said that a deputy mineral surveyor could come within the purview of the above defini-

tion. He keeps no registers or accounts, he has no custody of papers or property belonging to the public or to any person by whom he is employed. His duties simply consist, when employed by the locator of a mining location, in surveying the claim, in preparing a plat and field notes. When these notes and plat are filed in the Surveyor General's office, all connection with him is ended, unless perhaps to amend any error that he may have made therein. His duties are strictly professional, and in no sense could be deemed those of a clerk, either in or out of the General Land Office.

The New York Charter, section 28, declares that the number and duties of all officers, clerks, employees and subordinates shall be such as the heads of the respective departments shall designate and approve.

It was held in the case of *People* vs. *Fire Commissioners of City of New York,* 73 N. Y., 437, 442, that:

> "In its popular sense 'clerks' denotes those whose duties are clerical and they may be very various. The term does not include every employee and subordinate of the Department. A clerk in an office is defined to be a person employed in an office, public or private, for keeping records or accounts, whose business is to write or register in proper form the transactions of the tribunal or body to which he belongs; and persons employed to assist, as a surveyor in the

execution of the laws regulating the storage, sale and use of combustibles, and assist the fire marshal in the investigations of the cause of fires, are not clerks within the meaning of the Charter. Their duties are not clerical in any sense."

In the case of *People ex rel Satterlea* vs. *Board of Police,* 75 N. Y., 38, where it was held that a police surgeon is not a clerk or employee within the meaning of the provision of the act supplemental to the New York Charter of 1873, which gives to the Board of Police power to fix the salaries and compensation of all clerks appointed by said board, and of all employees whom they may be authorized to appoint, the New York Court of Appeals, said:

"The second section of the same act confers upon the Board of Police the power to fix the salaries of all clerks appointed by the board and all employees whom they may be authorized to appoint. The designation of 'clerks' and 'employees' is significant and indicates an intention to exclude all other but those named and if surgeons who take an official oath (*Collins* vs. *The Mayor,* 3 Hun., 681), were intended, it would seem that they should have been designated. Certainly they are not clerks and as employees are usually considered as embracing laborers and servants and those occupying inferior positions, they can scarcely be included in that class of persons. A difference is manifestly made between a clerk and an employee and an officer; and one who does not discharge inde-

pendent duties but who acts under the direction of others is not an officer."

(C) *A deputy mineral surveyor is not an "employee" in the General Land Office.*

While the term "employee" is broader than that of "clerk" it can not be said to cover deputy mineral surveyors in their relations to the Government.

The *Century Dictionary* defines employee to be:

> "One who works for an employer; a person working for salary or wages; applied to one so working; but usually only to clerks, workmen, laborers, etc., and but rarely to the higher officers of a corporation or government or a domestic servant."

While the *Standard Dictionary* defines the term thus:

> "One who is employed; one who works for wages or a salary; one who is engaged in the service of or employed by another."

It will be noted that the underlying note of the above definition is "working for salary or wages."

In the case of *McCluskey* vs. *Cromwell,* 11 N. Y., p. 593, it appeared that one Cromwell contracted with the Canal Commissioners of the State of New York to construct certain locks on the Black River Canal, and in accordance with a statute of New York, executed a bond conditioned that he, his heirs,

executors or administrators would cause to be paid in full the wages stipulated to be paid every laborer employed by him, or his agents, in the construction of the work as often as once a month. In performing the work on the locks, Cromwell entered into a contract with one Shippey, by which the latter agreed to do the masonry on the locks, Cromwell to furnish the foundations necessary and to pay Shippey a specified price per yard monthly as the work progressed. No consent was given by the State or any of its officers to this contract, nor did the State recognize any one but Cromwell in the construction of the locks, or in paying for the work done thereon. The plaintiff in the suit and other persons named in the complaint, were employed by Shippey, who absconded and left them without their wages. They sued and wanted to hold Cromwell liable therefor upon the bond he had executed to the State of New York. The Court of Appeals said, in holding Cromwell not liable on said bond:

> "The bond provides for the payment of wages stipulated and agreed to be paid to the laborers employed by Cromwell or his agent or agents, and that upon the failure of Cromwell 'to pay to each and every of the laborers as aforesaid, employed by him, as is herein provided, then each and every of said laborers to whom the aforesaid Cromwell shall then be indebted, may bring an action on this instrument in his or her name pursuant to the provisions of the Act

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aforesaid, for the recovery of the amount of such indebtedness.' The referee has found that the plaintiffs and the other laborers to whose claims the plaintiff has succeeded by assignment were employed by Shippey and consequently that they were not employed by Cromwell. Unless therefore the word 'employment' means one thing in the judgment of the referee and another in the undertaking of the parties, the laborers were not employed by Cromwell within the intent of the bond. It is not the labor performed upon the work alone which gives the laborer rights under the bond, but it is labor done in pursuance of an employment by Cromwell—*'to employ is to engage in one's service; to commission and intrust with the management of one's affairs; and when used in respect to a servant or hired laborer, is equivalent to hiring, which implies a request and a contract for compensation, and has but one meaning when used in the ordinary affairs and business of life.'* By laborers employed by Cromwell, mentioned in the condition of the bond, are intended those hired by him, working at his request and under an agreement on his part to compensate them for their services; and employment by Shippey as found by the referee, in this sense excludes the idea of employment by Cromwell. *The Plaintiff and his co-laborers were confessedly the servants and agents of Shippey and could not at the same time and in the same sense, be the servants and agents of Cromwell.* Shippey was indebted to them upon his contract of hiring and there being nothing in this case to take it out of the ordi-

nary rule, it follows that Cromwell was not indebted to them upon the same contract."

Salary as defined in the *Century Dictionary* is:

"The recompense or consideration stipulated to be paid to a person periodically for services; usually, a fixed sum to be paid by the year or quarter."

While wages is defined in the same dictionary to be:

"That which is paid for service rendered; what is paid for labor; hire; now usually in the plural. In common use the word 'wage' is applied specifically to the payment made for manual labor or other labor of a menial or mechanical kind."

A United States mineral surveyor receives no compensation from the United States of any kind or character, neither salary nor wages (Sec. 2334, *supra, Hand* vs. *Cook, supra*). He is therefore not an employee of the Government. Unless the Government is to pay him originally, or to pay him in default of his receiving compensation from the person by whom he is employed, it can not be said that he sustains the relation of employee to the Government.

Says the Supreme Court in *U. S.* vs. *Meiggs*, 95 U. S., 748:

"It is very difficult to see how this deputy clerk can be called an employee of the Government at all. The Government *was never liable to him for any salary at any time,* and, if the principal clerk had failed to pay him the $2000 the Government clearly would not have been liable for it."

The same ruling was made with reference to a deputy marshal in the case of *ex Parte Burdell,* 32 Fed., 681, where the Court say:

"Mr. Simmons is chief clerk of the marshal, and is also deputy marshal. He is employed with the other clerks of the marshal, in keeping his accounts with the Government, and the records of the office. His title 'chief clerk' is simply the designation given him by the marshal, fixing his relative position in that office. As with all the other clerks in the office he holds his place at the will of the marshal, was appointed by the marshal, and is paid by him under a private arrangement with him. These clerks have no claim on the Government at all for pay and look entirely to the marshal."

So, too, to the same effect see

Powell vs. *United States,* 60 Fed., 689, 690.

See also,

People vs. *Ahearn,* 110 N. Y. S., 306.

In the case of *United States* vs. *McDonald,* 72

Fed., 898, where a lawyer had been appointed by a district attorney ostensibly as a clerk but to assist him in the duties of his office pursuant to a letter from the Attorney General authorizing such appointment, on condition that the appointee should look solely to the district attorney for his compensation, which was to be paid out of the emoluments of the office, the Circuit Court of Appeals for the Ninth Circuit held that he was not an employee of the United States, Judge Hawley saying:

> "The facts of this case present the question whether there is such a privity between McDonald and the Government as to authorize him to maintain an action against the United States for the services rendered by him as clerk in the office of the United States Attorney for the district of Montana. The United States never employed McDonald to perform any services, legal or clerical in their behalf. It is true that the Attorney-General gave authority to the United States Attorney for the District of Montana to appoint McDonald as a clerk in his office, to assist him in the discharge of his duties as district attorney at a named salary, but this authority was given upon the express condition that McDonald 'is to understand that he can have no account against the United States for services but is to look exclusively to the district attorney for his compensation.' This authority is conclusive. Its true interpretation and meaning govern the question."

The idea of continuous service is inseparable from the term "employee." It does not imply occasional services at uncertain intervals. It surely can not be applied to one who neither receives compensation nor renders any service whatever. Under the contention that must be deduced from the ruling of the Circuit Court of Appeals, a deputy mineral surveyor, although he never receives any compensation from the Government, and never performs a service for it, and may make but one contract to survey a location in a year with a private individual, he is still prevented from making a location on the mineral lands of the United States, because he is an employee of the Government.

This differs from the construction placed upon the word "employee" by this Court. In the case of *Louisville, E. & St. L. R. Co.* vs. *Wilson,* 138 U. S., 501, 505, where it is said:

> "The terms 'officers' and 'employees' both alike refer to those in *regular* and *continual* service. Within the ordinary acceptation of the terms, one who is engaged to render service in a particular transaction is neither an 'officer' nor an 'employee.' They imply *continuity of service* and exclude *those employed for a special and single transaction.* An attorney of an individual retained for a single suit is not his employee. It is true he has engaged to render services, but his engagement is rather that of a contractor than that of an employee."

And again in the case of *Auffmordt* vs. *Hedden*, 137 U. S., 310, the same rule was applied. There the Court was passing on the status of a "merchant appraiser" who was appointed by the collector of customs under the authority of section 2390 of the Rev. Stats., and whose compensation was payable by the importer. There the Court said:

> "The merchant appraiser is an expert, selected as an emergency arises upon the request of the importer for a reappraisal. His appointment is not one to be classified under the civil service law. He is not to be appointed on a competitive examination, nor does he fall within the provisions of the civil service law. He is not a 'clerk' nor an 'agent' nor 'a person employed' in the customs department, within the meaning of section 6 of the Civil Service Act; nor is he an officer of the United States required to be appointed by the President or a court of law or the head of a department. He is an expert selected as such. Section 2930 requires that he shall be a 'discreet and experienced merchant familiar with the character and value of the goods in question.' He is selected for the special case. He has no general functions nor any employment which has any duration as to time, or which extends over any case further than as he is selected to act in that particular case. He is an executive agent, as an expert assistant to aid in ascertaining the value of the goods, selected for the particular case on the request of the importer and selected for his special

knowledge in regard to the character and value of the particular goods in question. He has no claim or right to be designated or to act except as he may be designated."

See also:

Vance vs. *Newcomb*, 124 U. S., 311;
Pack vs. *The Mayor, etc., of New York*, 8 N. Y., 222;
Campfield vs. *Lane*, 25 Fed., 128;
Kelly vs. *The Mayor of New York*, 11 N. Y., 432;
The People ex rel Peter Morris vs. *Randall*, 73 N. Y., 416;
Blake vs. *Ferris*, 5 N. Y., 58.

A deputy surveyor comes in contact with the Land Department only in the special case or cases in which his services have been engaged by intending mineral claimants. He has no access to the records of the Surveyor General's office, the local land office or the General Land Office or the office of the Secretary of the Interior other than those enjoyed by the public generally.

Hand vs. *Cook, supra.*

He is an outsider. In his practice as a mineral surveyor he may have access to the official plats of survey and other public records which may have any bearing on the case in hand, just as his principal

may have. An attorney practicing before the Land Department has the same opportunity to examine the records of the Department open to the public, having any bearing on the matters concerning his client's case,—yet it can not be contended that an attorney practicing before the Land Department is therefore precluded from exercising the right and privilege of purchasing the public lands. If a deputy mineral surveyor in any wise misconducts himself in his practice before the department, his license or appointment may on cause shown be revoked, as is expressly provided in the regulations hereinabove referred to (paragraphs 118, 119). He is a mere licensee exercising the right given by his license occasionally and at irregular intervals.

It seems to us therefore clear that by any fair interpretation of the terms of the statute, it does not include United States deputy mineral surveyors.

The object of the statute is thus stated by Secretary Noble, in Herbert McMicken's case (10 L. D., 97, 99), cited by the Circuit Court of Appeals in its decision:

> "The object of section 452 was evidently to remove from the persons designated, the temptation and the power by virtue of the opportunities offered them by their employment to perpetrate frauds and obtain an undue advantage in securing public lands over the general public by

means of their earlier and readier access to the records relating to the disposal of and containing valuable information as to such lands."

But a mineral surveyor is no more within the prohibition of the statute than is an attorney practicing before the Land Department.

Can he be brought within the prohibition of the statute because to do so will in the opinion of this Court help to suppress the mischief which it is claimed the statute is directed against? This was the position taken by the Secretary of the Interior in the McMicken case cited by the Circuit Court of Appeals in its opinion. He did not pretend to found his decision upon any claim that the words "in the General Land Office" comprehended the office of the Surveyor General in Washington Territory. He said "Officers, clerks and employees in "the offices of surveyors general fall clearly within "the *mischief contemplated by the statute and the* "*reason for the law applies to them with equally as* "*much force as to those in the central office at* "*Washington.*"

The Secretary here recognized that the *words* of the statute applied only to the clerks, etc., "in the General Land Office" at Washington, but he assumed that he had authority to extend its provisions over other persons "because the reason of the law applies

to them with equally as much force!" A curious rule of construction.

The law is beyond controversy that where a statute plainly points out the persons subject to its provisions no others can by construction be brought within the purview thereof.

> "The object of an interpretation and construction of statutes is to ascertain and carry out the intention of the law makers, and when the intention is ascertained, it must always govern. The intention of the legislature must be sought in the statute itself and it is only when the act is of doubtful or ambiguous meaning that the province of construction begins."
>
> 26 *Am. & Eng. Ency. Law,* (2nd Ed.), p. 597.

In *Hamilton* vs. *Rathbone,* 175 U. S., 4217 Brown, J., said:

> "The cases are so numerous in this Court to the effect that the province of construction lies wholly within the domain of ambiguity that an extended review of them is quite unnecessary."

The use of the word employee implies the relation of master and servant.

> "The relation of master and servant in its full sense invariably and only arises out of a contract,

express or implied, between the master on the one hand and the servant on the other."

Wood on Master and Servant, section 4.

A mineral surveyor can not be said to be equal to such a test so far as the United States is concerned. He has no contract with the government, but he does have a contract of hiring with a mineral applicant; he is therefore the servant of the applicant if any. Since to constitute the relation of master and servant, the actions of the latter must be presumptively or in fact controlled by the former, a contractor who simply undertakes to bring about a result after his own methods, is not a servant.

Bishop on non-contract law, Sec. 602.

Where a contractor to grade a street "agreed to conform the work to such further directions as should be given by the street commissioner and one of the city surveyors," (which is about the same power and authority as is exerted over a deputy mineral surveyor by the Surveyor General or the other officers of the General Land Office), the Court held:

"This clause in the contract does not in any manner affect the case. It does not constitute Foster (the contractor) any more the immediate agent or servant of the defendant than if the provision were not inserted in his contract."

Pack vs. *Mayor of New York, supra.*

In *Kearney* vs. *Oakes, et al.,* 18 Canada Sup. Ct., 148, a contractor with the Canadian government for the construction of a government railway being sued for acts performed by him in the execution of said government work, pleaded that he was an employee of the government, and entitled to certain notice as such employee. His services seem to have been analogous to those of a deputy mineral surveyor, viz: to do government work on government land, but he was also paid by the government. But the Court held that employee meant servant and nothing more.

See also

Commonwealth vs. *Binns,* 17 Serg. & Rawle, 220.

Construing a statute of Indiana giving a lien upon the assets of a corporation in favor of employees, this Court in the case of *Vance* vs. *Newcomb,* 132 U. S., 220, 233, say:

> "It seems clear to us that Vance was a contractor with the company and not an employee within the meaning of the statute. We think the distinction pointed out by the Circuit Court is a sound one, namely, *that to be an employee within the meaning of the statute Vance must have been a 'servant bound in some degree at least to the duties of servant' and not, as he was,*

'a mere contractor bound only to produce or cause to be produced a certain result'—a result of labor, to be sure—but free to dispose of his own time and personal efforts according to his pleasure, without responsibility to the other party."

A mineral surveyor is an independent worker. He accomplishes his duties by the use of his own funds and the employment of expensive instruments and whatever assistants he requires at his own cost. He agrees to produce a certain result, namely, a survey of the location in his own time and in his own way and for a specified sum. He is therefore a contractor only.

From these authorities we maintain therefore it is conclusively shown that Whittren was neither an officer, a clerk, or employee of the United States "in the General Land Office" or elsewhere.

Finally we submit in conclusion that this Court should reverse the decision of the Circuit Court of Appeals affirming the judgment of the Alaska Court,—

1. Because the location of Whittren in 1902 vested in him all of the rights accruing from a valid location, of which he could not be deprived by the casting off of his excessive area.

2. Because the provisions of section 452 of the

Revised Statutes of the United States do not apply to him as a surveyor licensed under section 2334 to make surveys of the mineral lands of the United States.

3. Because assuming this Court holds him to be within the purview of said section 452, the only penalty expressed in the statute for a violation of its provisions is the loss of his license to survey.

4. Because no penalty by way of avoiding the location being prescribed by the statute, such penalty should not be applied to innocent purchasers from him.

5. Because the validity of a location made by Whittren as a deputy surveyor cannot be collaterally impeached but if it is voidable is subject only to direct attack by the government.

For all of which reasons we ask that the judgment of the Circuit Court of Appeals be reversed.

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Of Counsel.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1911.

No. 84

FRANK W. WASKEY, JOSEPH M. CRABTREE, J. POTTER WHITTREN AND ANDREW EADIE,
Petitioners.

vs.

JOSEPH HAMMER, OTTO HALLA AND B. SWARZ.

On Petition for writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF IN BEHALF OF PETITIONERS.

ALBERT FINK,
Attorney for Petitioners Whittren and Eadie.

GUNTHORP-WARREN PRINTING CO., CHICAGO

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BRIEF IN BEHALF OF PETITIONERS.

STATEMENT OF THE CASE.

(All Italics Ours.)

This was an action of ejectment by defendants in error, plaintiffs below, and hereinafter called plaintiffs, to recover possession of a portion of a placer mining claim, known as "*The Golden Bull,*" in conflict with with and overlapping a senior location, known as "*The Bon Voyage.*" Plaintiffs claimed title under the junior location, made in January, 1904.

Petitioners, plaintiffs in error, defendants below and hereinafter called defendants, claimed title under the senior location made in January, 1902.

The relative position of the two claims is shown by the map. (Tr., 26.)

The complaint alleged ownership in the plaintiffs by reason of the location of The Golden Bull, ouster by defendants, and sought to recover all that portion overlapping and in conflict with the Bon Voyage.

The defendants, Whittren and Eadie, answered denying the allegations of the complaint and setting up their title to the Bon Voyage.

Waskey and Crabtree answered denying the allegations of the complaint and setting up that Whittren and Eadie, being the owners of the Bon Voyage, under a valid and subsisting location made by Whittren in January, 1902, had executed to them a lease of the premises in dispute, under which they justified their presence and the mining operations they had conducted thereon.

In their reply plaintiffs denied the affirmative matters set up in the answers, and alleged a failure of defendants to perform the annual labor for the year 1903.

Thus there were but three issues presented by the pleadings:

1. Did plaintiffs make a valid location?

2. Did defendants have a prior location?

3. Had this prior location become forfeited by failure to perform the annual labor for the year 1903?

Upon the trial plaintiffs proved a location of the Golden Bull on the first of January, 1904, predicated upon an alleged discovery of *prospects* in 1901; that defendants were in the actual possession, engaged in mining thereon, and rested.

Defendants then proved their prior location—the marking of the boundaries, the posting and recording of a proper notice of location; the discovery of gold, the conveyance of an undivided one-half interest to Eadie and the execution of the leases by Eadie and Whittren to Waskey and Crabtree.

Upon the cross-examination of Whittren, the original locator of the Bon Voyage, it developed that the claim as originally located, was a few feet in excess of twenty acres; that in 1903, *when he was having the annual labor for that year performed,* he surveyed the claim, and in order to make it conform to the size allowed by law, he had drawn in his westerly side line a few feet.

In the drawing in of this line he excluded from the claim the point at which he had made his original discovery of gold.

He made another discovery about the center of the claim shortly thereafter and at the point he had caused the annual labor to be performed. All these events transpired *prior* to the location of plaintiffs.

In 1902, when he made his original location and discovery Whittren was not a deputy United States mineral surveyor, but in 1903, when he caused the annual labor to be performed made his survey and second discovery, he had become such deputy, having been appointed in February of that year.

Defendants having proven their prior location, rested.

It was when the duty of plaintiffs to prove that defendants had failed to perform the annual labor for the year 1903. Instead, plaintiffs moved the court to direct a verdict, because it appeared that after the original location, Whittren had abandoned the *particular spot* where he made his discovery, and that as to the new discovery, this having been made by him after he became a deputy mineral surveyor, the location was void and a nullity.

The court, over the objection of defendants, granted the motion and directed a verdict for plaintiffs, upon which judgment was subsequently rendered and affirmed upon writ of error to the Circuit Court of Appeals for the Ninth Circuit.

It is to review the decision of the Circuit Court of Appeals, affirming this judgment, that this petition for certiorari has been made and allowed.

SPECIFICATION OF ERRORS.

I.

The court erred in sustaining the action of the trial court in granting the motion of plaintiffs to direct a verdict in their favor.

II.

The court erred in sustaining the trial court in holding that the location of the Bon Voyage claim, in January, 1902, was invalid because no discovery of gold had been proven to have been made within the limits of the claim as surveyed in November, 1903.

III.

The court erred in sustaining the trial court in holding that because Whittren, the locator of the Bon Voyage, was a United States Deputy Mineral Surveyor in 1903 he could not thereafter make a valid discovery of gold on the Bon Voyage claim which had been duly and regularly located by him in January, 1902, and before he became a deputy mineral surveyor.

ARGUMENT.

The Circuit Court of Appeals decided:

1. That when Whittren excluded the point of his original discovery it became necessary that he make another discovery within the boundaries as readjusted.

2. That Section 542 of the Revised Statutes prohibited Whittren from making such a discovery in December, 1903.

The reasoning advanced to sustain this position may best be indicated by its reduction to two syllogisms:

I.

EVERY AMENDED LOCATION THAT DOES NOT CONTAIN A POINT OF DISCOVERY IS INVALID.

THIS AMENDED LOCATION DID NOT CONTAIN A POINT OF DISCOVERY.

Therefore this amended location is invalid.

II.

NO PERSON DISQUALIFIED UNDER THE LAW CAN MAKE A VALID LOCATION.

WHITTREN WAS A PERSON DISQUALIFIED UNDER THE LAW.

Therefore Whittren could not make a valid location.

For convenience the argument will be confined to an examination of these two propositions.

IV.

The court erred in sustaining the trial court in holding that a valid location of a placer claim cannot be made by a deputy mineral surveyor.

V.

The court erred in sustaining the trial court in holding that by the exclusion of the original point of discovery by the survey of November, 1903, the entire claim became invalid.

I.

Here the error is in the major premise:

> "Every amended location that does not contain a point of discovery is invalid."

If there be one point settled by the decisions of this court, it is, *that, upon a valid location* of a mining claim *title vests* in the locator to an *estate* from which he *shall not* be divested, *even by act of Congress.*

> "The interest thus acquired is a valuable property right which may be mortgaged, transferred, inherited and taxed. *The right of possession is good against all the world, including the United States.*"
>
> *Belk* v. *Meagher,* 104 U. S., 279; 26 L., 735.
>
> *Forbes* v. *Gracey,* 94 U. S., 762; 24 L., 313.
>
> *St. Louis Mining Co.* v. *Montana,* 171 U. S., 650; 43 L., 320.
>
> *Elder* v. *Wood,* 208 U. S., 226; 52 L., 464.
>
> *Manuel* v. *Wulff,* 152 U. S., 505; 38 L., 332.

If, then, upon the making of a valid location, *title vests,* how can it be divested except by *consent* of the locator or in consequence of some *condition subsequent* imposed in the grant? Is the grant upon condition that the precise point of original discovery be retained? *Where is this in the statutes?*

How can a right of property in the whole be reconciled with a prohibition against the transfer, relinquishment or abandonment of a part?

The whole doctrine rests upon a misconception of *Gwillim* v. *Donnellan,* 115 U. S., 45, where defendant,

claiming, under the Mendota, located in November, 1878, was adversed by plaintiff, claiming under the Cambrian, located in May of the same year. The Cambrian was senior to the Mendota, *but was junior to the Fallon,* a third location, which proceeded to patent, including within its boundaries the only point of discovery made upon the Cambrian. The decision proceeded upon the principle that the defendant might have proved that the Fallon was a valid and subsisting location at the time of the attempted location of the Cambrian; therefore the Cambrian location was *never* valid, the only discovery upon which it was predicated having been made *within the limits of another valid and subsisting claim;* that the securing of the patent by the Fallon was a *conclusive adjudication* of such a state of facts; that is that the *Fallon was an older and senior location to the Cambrian.* The court said:

> "If there had not been a patent to Fallon it would have been competent for the defendants to prove on the trial that when Thomas (the locator of the Cambrian) entered, Fallon held and owned a valid and subsisting location of the same property and was the first discoverer of the lode, the apex of which was within the surveys of the line of Thomas' claim. Had this been done the location of Thomas would have been adjudged invalid, *because the land on which his alleged discovery was made was not open to exploration, it having been lawfully located and claimed by Fallon.* The admission made by the plaintiff at the trial and on which the court acted in instructing the jury to find for the defendants, is equivalent to *such proof.*"

The issue of the patent to Fallon was *equivalent* to a determination by the United States in

an adversary proceeding to which Thomas (the Cambrian) was in law a party; that Fallon had title to the discovery *superior* to that of Thomas and that *consequently* Thomas' location was *invalid*. This barred the right of Thomas to apply to the United States for a patent, and of course *defeated his location*. From that time all lands embraced in his location not patented to Fallon were open to exploration and subject to claim for new discoveries.

The loss of the discovery was a loss of the location."

Certainly *in this case* the loss of the discovery was the loss of the location,—but why? Because the Fallon, being senior, a discovery made within its limits was no discovery, not being upon the unappropriated public domain.

The decision was not because the Cambrian had located and then abandoned the point of discovery, but *because the Cambrian had never made a discovery upon unappropriated lands.*

This was *all* that was decided. The Fallon, being senior to the Cambrian in point of fact, and this having been *conclusively adjudicated* by the issuance of a patent, it necessarily followed that the only discovery made by the Cambrian was upon lands belonging to the Fallon, and was, therefore, in law, *no discovery at all.*

The case is essentially different from what it would have been had the Fallon location been junior instead of senior to the Cambrian.

Had this been the case there would have been a valid location of the Cambrian, a vesting of the estate, a right of possession to the whole, *continuing*

so long as the annual assessment work was performed thereon.

In the case presented, however, there never had been *any location,* for that the *only discovery* was upon a prior valid and subsisting claim.

Because this court has said that a claim was invalid where it had been conclusively determined that there had *never been a discovery upon unappropriated lands,* it is assumed that where there *has been a valid discovery,* which has been relinquished, conveyed, or abandoned, the entire claim is invalidated.

Obviously no such conclusion legitimately flows from the premises, and the distinction between the two cases is too apparent to admit of argument.

PLACERS DIFFER FROM LODE LOCATIONS.

In any event there is an essential and fundamental difference between a placer and a lode location. Whatever reason might be assigned for extending the *supposed* doctrine of *Gwillim* v. *Donnellan* further than the facts of that case in *lode locations,* can find no support when applied to *placers.*

In lode locations the grant is only to those who locate a *vein, lode* or *ledge.* It is only upon *such location,* that is of a vein, lode, or ledge that the right to the surface is granted.

The rights granted depend entirely upon the ledge discovered and located. The ledge located is the principal thing. The right to the surface, and the unknown, or blind lodes, or ledges apexing inside of such surface lines, extended downward vertically, is

incidental. These rights do not attach upon the marking of the boundaries but only upon the *discovery of the lode.*

As said in Silver v. *Lowry (Utah, 1899); 57 Pacific, 13:*

> "Where the locator allows another to patent the discovery point, which includes all of the known apex of the *only vein discovered*, or by conveyance or otherwise parts with his title thereto, *an entry cannot be made of the residue of the claim*, because proof cannot be made that any vein, or lode, having its apex within the ground sought to be entered exists or has been discovered, and in the absence of such proof there is no basis for any claim either to the surface ground, or a lode vein, or deposit of mineral under the Minings law."

Thus the loss of the main thing, that is, the ledge itself, by patent to another, or grant, or abandonment, might, with some show of reason, be held evidence of an intention to abandon the incidents.

But how different is the location of a placer, *where it is presumed that the auriferous gravels extend through the entire claim.*

It is even provided by statute for the acquisition of those portions of legal subdivisions not in fact mineral.

> "Where placer claims cannot be conformed to legal subdivisions, survey and plat shall be made as of unsurveyed lands, and where by the segregation of mineral lands in any legal subdivision a quantity of agricultural lands less than forty acres remains, such fractional portion of agricultural land may be entered by any party qualified by law for homestead or pre-emption purposes." *R. S.* 2331.

So it is provided that when the lands have been surveyed, the location of a placer must conform to legal subdivisions.

> "Claims usually called placers * * * shall be subject to entry and patent * * * but where the lands have been previously surveyed by the United States the entry in its exterior limits shall conform to the legal subdivisions of the public lands." R. S. 2329.

It is clear Congress intended, upon discovery of placer gold, to grant to the locator the tract appropriated *throughout its entire extent.*

How then can the precise point of discovery be of importance? True, there must be some discovery made, but when once this is accomplished, *title vests in the locator to the entire tract.* By what *legerdemain*, can it be that title to the whole will be divested by loss of *a portion?*

Can it be said that if A locates twenty acres and subdivides it into four tracts he shall lose the balance of his claim by a conveyance of that upon which the discovery was made?

Can it be that if eight persons locate 160 acres, and then divide in equal parts, only he shall have a valid claim who secures that upon which the discovery was made?

Can it be that if eight persons, having located 160 acres sue for partition and the court divides the claim among them in separate parcels, he *only* shall have a valid title who is so fortunate as to secure the precise tract upon which the discovery was made?

If A makes a valid location and conveys or leases a portion other than that upon which he made the

discovery (*something that is done every day*), will his grantee receive nothing?

Can it be that if A makes a valid location and then sells the one acre, or few feet upon which he made discovery, the other nineteen acres, or balance of his claim, will immediately, upon the execution of the deed, become subject to appropriation by others? *Why?*

What public purpose or sound policy is conserved by the imposition of such a restriction upon his right to do with his own as he desires?

It is conceded that, had Whittren done nothing he might have held the *entire claim. Will he be stripped of it in his effort to comply with the strict letter of the law?* Suppose while actually engaged in the mining of his claim some person had persuaded him to sell that particular portion where the discovery was made. Can it be possible that such person might then lawfully locate the balance?

Yet all of these seemingly absurd and *unconscionable* conclusions must necessarily flow from the extension of the supposed doctrine of *Gwillim* v. *Donnellan further* than the facts of that case.

There is no distinction between such a relinquishment to an individual, and one to the general Government.

The confusion arises from an effort to regard as *identical* things which are essentially *dissimilar.* A failure to make a *discovery at all* with a *valid discovery* and subsequent transfer of a portion—the location of a specific lode with that of a tract containing auriferous gravels—what is perfectly *reason-*

able in the one case is *utterly without support in the other.*

The loss of the lode is the loss of everything actually located or appropriated. The abandonment of the particular point of discovery in a placer is the loss only of a very small portion of that which has been segregated.

It is admitted that Whittren could have drawn in *any other line of his claim.* Can it possibly be said there is any real supporting reason why he should be prohibited from drawing in this one?

He acted in perfect good faith; he injured no one. Must he lose his claim for that, *not being learned in the law,* he drew in the west side line when he should have drawn in the south end line?

Such contentions render law odious. They sacrifice *substance* to *form.*

The doctrine of *Gwillim* v. *Donnellan* has never been pushed further than the facts of that case.

In Little Pittsburg v. *Amie,* 17 Fed., 57, speaking of this doctrine, Judge Hallet than whom there have been few abler jurists in the mining law said:

> "The position taken appears to be to the effect that one who owns a mining claim, must at all events hold on to his discovery shaft until he has obtained a patent for his claim."
>
> "If he yield it to another in any way, by conveyance or otherwise, he thereby abandons the rest of his claim."
>
> *"I do not see upon what principle such a conclusion can rest."*
>
> *"After a claim has been properly located, the owner of it may sell any part without prejudice to his right to hold the remainder."*

"He may dispose of it by gift or grant in any way that seems proper to him."

See also:

Silver City v. *Lowry* (Utah) 57 Pac., 11.

Tonapah v. *Tonapah,* 125 Fed., 408.

The obvious distinction between the case at bar and that of *Gwillim* v. *Donnellan* is that in the latter *no valid location was ever made,* while here *the contrary is conceded.*

II.

Here the error lies in the minor premise.

"Whittren was a person disqualified under the law."

This is based upon section 452, of the revised statutes.

"The *officers, clerks* and *employes* in the General Land Office are prohibited from directly or indirectly purchasing, or becoming interested in the purchase of any of the public lands, and any person who violates this section shall be forthwith removed from his office."

The error is in assuming that a deputy mineral surveyor is an employe of the General Land Office.

As no one will now contend that he is either an *officer* or a *clerk,* and as the learned court below seemed upon an argument that he was an *officer* to regard him as an *employe,* and to affirm the judgment upon this ground, the discussion will be devoted solely to the question as to whether or not he was in fact an *employe.*

An employe is defined as follows:

"One who works for an employer; a person

working for salary, or wages."—*Century Dictionary.*

A deputy mineral surveyor cannot be held within this definition in his relation to the General Land Office. He does not work for it. It is not his employer. He receives from it no salary, or wages, or compensation. He does not even hold his appointment from it.

Deputy Mineral Surveyors are appointed without limit, and for no particular time by the Surveyor General of the United States, under the provisions of Section 2334, Revised Statutes. They do not remain, under the direction or supervision of the Surveyor General; they are not obliged to perform any service either for the Government, or for an individual.

When employed at all, they are employed by the locator of the mining claim in question for the purpose of securing a proper plat upon which to predicate an application for patent. They are hired by such person, work for such person, and are by him compensated. They receive no salary, or compensation whatever from the Government.

His relation to the Land Department is identical with that of a lawyer admitted to practice therein. Just as a locator desiring to secure a patent, or conduct any litigation before the Department must employ some person admitted to practice therein, so the applicant for a patent must employ some person permitted by the Department to make surveys. In each case the services rendered are *purely pro-*

fessional and in the interest not to the General Land Office, but of the particular employer.

It might just as well be held that an *official court reporter* who draws his entire compensation and receives his employment solely and entirely from individual litigants is an employee of the department of justice.

A deputy mineral surveyor owes no higher greater or different allegiance to the General Land Office than a lawyer admitted to practice therein. For malpractice either may be removed, as an official court reporter might be for misconduct.

Nor is this position unsupported by authority. It was expressly so held in *Hand* v. *Cook,* 29 Nev., 518; 92 Pacific, 3.

It is true a contrary conclusion was reached by the Supreme Court of Utah in *Lavignino* v. *Uhlig,* 26 Utah, 1; 71 Pacific, 1046, but it is submitted that this decision is based upon no discussion of the subject and assigns no controlling reason as its predicate. It is simply assumed that a deputy mineral surveyor is within the inhibition of the statute.

In *Hand* v. *Cook, supra,* however, the point is examined, the reasons, pro and con, analyzed and discussed.

The decision of this court in *Prosser* v. *Finn,* 208 U. S., 67; 28 S. C. R., 225, cited by the learned court below, is not in point, for no one could legitimately contend that a *special agent of the General Land Office,* employed by it, and receiving from it his compensation, was *not an employe.*

That the General Land Office has itself concluded

that a deputy mineral surveyor is an employe within the prohibition of the statute is not controlling. The earlier view of the Department was to the contrary and no sufficient reason is assigned for the change of sentiment.

Instructions of Com. of Gen. Land Office, 2 L. D., 313.
Dennison v. *Willits,* 11 Copps. L. O., 261.
Lock Lode, 6 L. D., 105.

The confusion seems to have arisen from a feeling that in as much as a deputy mineral surveyor owed some kind of duty or allegiance or obligation to the General Land Office, he must of necessity be either an *officer, clerk* or *employe.*

Of course no such conclusion legitimately flows from the premises, and as has been pointed out the only duty, obligation or allegiance, due is identical with that of an attorney, and purely professional in its nature.

Certain persons qualified by previous training, profession, ability and good reputation are permitted to prepare papers for applicants for patent and present their causes, certain other persons *deputy mineral surveyors,* by reason of the self same professional qualifications are permitted to prepare *other papers,* the plat, field notes, etc.

The erroneous conclusion finally reached by the Land Department upon this subject had its inception in the case of

Floyd v. *Montgomery,* 26 L. D., 122.

where the deputy mineral surveyor had himself

surveyed his claim for patent and certified to the amount of labor performed thereon. Under such circumstances it was of course within the inherent power of the department in the proper administration of the land laws to reject the application, until passed upon by some disinterested person.

Yet it was from this decision that the theory was evolved that in no case could a deputy mineral surveyor secure patent. Assuming that because a deputy mineral surveyor would not be permitted to make survey field notes and certificate of amount of labor in his own case, he was therefore an employe, officer or clerk *in* the General Land Office.

Even after the decision of the Floyd case the doctrine was *doubted* by the Secretary in

Leffingwell, 30 L. D., 139, decided in 1900.

So that even if the word *in* as used be changed by the courts so as to make the statute read "* * * employes *of* the General Land Office" there must be still another interpolation "*or any person remotely connected therewith,*" before a deputy mineral surveyor could be legitimately brought within its terms.

Of course so far as the intention of Congress is concerned no one could assign any sound reason why a deputy mineral surveyor should be denied the right to locate and hold a mining claim.

But even conceding for the purposes of argument that a deputy mineral surveyor is an employe of the General Land Office, it does not follow that he is thereby disqualified; the penalty imposed by the

very terms of the statute itself for a violation thereof is removal from office and not *forfeiture of the estate acquired.* Had Congress intended this latter result it must certainly be assumed that it would have been incorporated in the statute.

To hold under the section in question that not only will the employe be reomved from office, but that he shall likewise forfeit his estate, is to again incorporate therein *something not put there by the Legislative branch of the Government, and to add another, greater and different penalty than that imposed.*

Nor does it follow, even if it be conceded that Whittren was so disqualified as to prevent him from making a new location after his appointment as a Deputy Mineral Surveyor, that such disqualification prevented him from doing any act necessary to keep alive the location which he had already made and in which he had secured a vested right prior to his appointment as a Deput Surveyor. The making of a *new lacation* after appointment is one thing; the doing of acts necessary to keep alive a location already made is *quite another.*

It has *always* been the practice of the Land Department to permit entries to be perfected where the rights had been initiated prior to any relation with the government, even though at the time of the entry the entrymen were in the government service and employed in the general Land Office.

Thus in the case of *Winana* v. *Beidler,* 15 L. D., 266, where the claimant an employe, of the general Land Office sought entry of a homestead, the right

to which he had initiated prior to his acceptance of employment. It was held:

> "In view of these facts I am of the opinion that Section 452 does not apply in this case, for I do not believe that Congress intended by the enactment of said section, *to deprive anyone of valuable property rights theretofore lawfully vested in him simply for the reason that after such person had made settlements on public land and made an entry or application to enter such land, under the Homestead Law, he received an appointment as a copyist in the General Land Office.*"

So it is said in a letter addressed by the Commissioner of the General Land Office to the United States Surveyor General, Salt Lake City, Utah, under date of June 17, 1909:

> *"A mineral surveyor who previous to his appointment had made a homestead entry, could complete his proofs and receive patent."*

It is to be remembered that in no sense did Whittren undertake the making of *a new location.* All he did was to do those acts which were necessary to validate and keep alive that location which he had *already made* and the right of property in which had fully vested in him long prior to his appointment.

If the mind can be brought to make itself believe that under the circumstances of this case it was necessary that Whittren make a new discovery in order to keep alive his rights, surely his connection with the general land office, if any, would not prohibit the performance of this act upon his part any more than it would inhibit the performance by him of the *annual assessment work necessary to accomplish the same result,* and we assume that no one would con-

tend that he would be prohibited from performing the annual labor required by law by reason of his appointment as a Deputy Mineral Surveyor.

INNOCENT PURCHASERS.

But conceding for the purpose of argument that Whittren was not only disqualified from making a new location, but even from doing any act necessary or requisite to the keeping alive of the location already made, it does not even yet follow that his grantees who took in perfect good faith and for a valuable and adequate consideration without any knowledge or notice either that he had drawn in the *wrong side line* or that he was a Deputy Mineral Surveyor, should be deprived of their property by third parties who are *without superior equities.*

It is true that this court has held, in homestead and pre-emption claims, that, as against the government seeking to cancel the entry for fraud, there could be no innocent purchaser prior to patent.

But these decisions rest upon the principle that in homestead and pre-emption cases prior to patent it is only the equitable title that is passed.

In the case of mining claims a legal estate of freehold passes upon a valid location, continuing so long as the locator shall comply with the law.

The grant of the statute is:

> "The locators of all mining locations heretofore made or which shall hereafter be made * * * their heirs or assigns * * * *so long as* they comply with the laws of the United States * * * shall have the exclusive right of possession an enjoyment, etc."

While there has been much confusion among the text writers and decisions as to the exact *tenure* by which a mining claim is holden upon location and prior to patent, it is believed that the question is in fact a simple one.

It is a grant as defined by Coke, upon *condition in law* as opposed to one upon condition subsequent or precedent. It is identical with the illustration given of *"a grant to A so long as he shall remain parson of Dale."* It is a qualified fee, amounting to a freehold. The estate may terminate by failure to comply with the mining laws at any time. On the other hand, it may continue forever. This is a legal estate just as much as the grant of an estate to A so long as the government of the United States shall continue Republican in form.

That it was an estate of freehold was expressly held in *White Star* v. *Hultberg* (Ill. 1906), 77 Northeastern, 334.

The issuance of patent *merely enlarges this estate to the fee simple absolute.*

Such titles, that is estates upon *condition in law,* are not *equitable;* they are *legal.*

From this it follows that the conveyance of such an estate to an innocent purchaser for value and without notice will cut off the equities of third parties. How much more, then, should such conveyance cut off *subsequent locators who are utterly without equity?* The manifest injustice of a contrary rule must be apparent.

This is *not a suit by the government* and even if the

case was similar to homestead or pre-emption entries, the doctrine there announced as to innocent purchasers would not apply.

THE QUESTION CANNOT BE RAISED BY PLAINTIFFS.

So, even though Whittren were disqualified and to such an extent as to render his location invalid as against the government, this is a matter in which the government, and it alone, is interested.

This was no adverse suit. In such cases it has been determined time and time again that the *disqualification* of the locator *cannot be raised.*

This point, it is insisted, is conclusive of this case.

It was not considered by the court below in its opinion.

No distinction can be drawn by any process of reasoning *between persons who are disqualified under the law.* They are simply *disqualified;* neither is more so than the other. And if it be conceded, for the purpose of arument, that a Deputy Mineral Surveyor is disqualified, there can be no question as to an alien, for he is made so by the *very terms* of the statute, the grant being only to citizens, or those who have declared their intention to become such.

Yet it has been uniformly decided that the question of the disqualification of the locator by reason of alienage could not be raised in a proceeding, such as this.

Lindley on Mines, Vol. 1, Sec. 233.
Martin's Mining Law, Sec. 98.

Costigon on Mines, p. 167.
Snyder on Mines, Sec. 263.
Lone Jack Mining Co. v. *Megginson*, 82 Fed., 89.
Billings v. *Asten*, 51 Fed., 338; 52 Fed., 251.
Tornanses v. *Melsing*, 109 Fed., 711.
Shea v. *Nilima*, 133 Fed., 209.
Manuel v. *Wulff*, 152 U. S., 505.
McKinley v. *Alaska*, 183 U. S., 563.

In the latter case this court said:

> "The meaning of *Manuel* v. *Wulff* is that the location by an alien and all of the rights following from such location, are voidable and not void *and are free from attack by anyone except the government.*"

If the location by a disqualified alien is free from attack by anyone except the government, it is not quite observed how the location of a Deputy Mineral Surveyor, equally disqualified, is not also free from such attack unless there be *degrees of disqualification* with which we are unfamiliar. It would seem that *disqualification* is *disqualification*, and that the rule in all cases should be the same.

For the reasons assigned it is respectfully submitted that the decision of the Circuit Court of Appeals for the Ninth Judicial Circuit affirming the judgment of the District Court of Alaska for the Second Division, should be reversed.

ALBERT FINK,
Attorney for Petitioners Whittren and Eadie.

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No. 84

In the Supreme Court

OF THE

United States

OCTOBER TERM 1911

FRANK H. WASKEY, JOSEPH M. CRABTREE, J. POTTER WHITTREN and ANDREW EADIE,

Petitioners,

vs.

JOSEPH HAMMER, OTTO HALLA and B. SCHWARZ,

Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENTS.

ALBERT H. ELLIOT,
Attorney for Respondents.

GEORGE W. REA,
Of Counsel.

Filed this ..... *day of November, 1911.*

JAMES H. McKENNEY, Clerk.

By ..... *Deputy Clerk.*

Index and Summary of the Argument.

The first location of the Bon Voyage dated January 2, 1902, was abandoned by Whittren, when he drew in his lines November 11, 1903, and excluded his discovery hole from the ground actually located.

The second location of the Bon Voyage consummated by Whittren December 13, 1903, when he discovered gold within the lines of the Bon Voyage, was invalid because Whittren performed the acts of location while he was a Deputy Mineral Surveyor.

A Deputy Mineral Surveyor is prohibited by Section 452 of the Revised Statutes from directly or indirectly purchasing or becoming interested in the purchase of any of the public lands.

Whittren was appointed a Deputy Mineral Surveyor in February, 1903, and was charged with the prohibitive restrictions of his office at the very moment that he was making his location of the Bon Voyage.

Schwarz completed his location of the Golden Bull claim January 20, 1904, by recording his location notice, he having previously discovered gold within the limits of the Golden Bull in September, 1901, and having staked the claim on January 1, 1904.

CONCLUSION.

Schwarz and his successors in interest (respondents herein) are clearly entitled to possession of the eight acres in conflict between the Bon Voyage and the Golden Bull locations.

Chronology of the Important Facts, Set Forth in the Transcript.

1902—Jan. 2, Whittren located Bon Voyage.
" " Halla discovered gold on Golden Bull.
" " 10, Halla located Golden Bull for Roth.
1903—Feb. Whittren appointed Deputy Mineral Surveyor.
" Nov. 11, Resurvey of Bon Voyage by Whittren and drawing in of lines.
" Dec. 13, Whittren discovered gold on Bon Voyage.
1904—Jan. 1, Schwarz staked Golden Bull.
" " 20, Schwarz recorded Golden Bull location notice.
" Mar. 23, Schwarz deeded one-half Golden Bull to Halla.
1905—Sept. 24, Whittren deeded one-half Bon Voyage to Eadie.
1906—June 11, Whittren and Eadie leased Western 220 feet Bon Voyage to Waskey until June 1, 1908.
" June 20, Whittren and Eadie leased Eastern 440 feet Bon Voyage to Waskey and Eadie.
" Oct. 15, Suit Hammer v. Waskey begun.
1907—Sept. 6, Trial of action.
" Nov. 16, Judgment for Plaintiffs filed.
1909—May 3, Judgment affirmed by U. S. Circuit Court of Appeals.
" July 6, Petition for Certiorari filed in the Supreme Court.
1910—Jan. 4, Return to Petition filed.

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BRIEF FOR RESPONDENTS.

Statement of the Case.

The case at bar is brought before this Court on petition for writ of certiorari and the return thereto, the

said writ being directed to the Circuit Court of Appeals for the Ninth Circuit. From the transcript of record, it appears that this Court is asked to review the judgment of the said Circuit Court of Appeals, rendered in an action wherein petitioners were plaintiffs in error and respondents were defendants in error, the said judgment having been given on appeal by writ of error from the District Court of Alaska, Second Division. The original action was one in ejectment brought by respondents as plaintiffs in the said District Court of Alaska, against petitioners, as defendants to secure possession of a certain piece of mining ground described generally as the Golden Bull Placer Mining Claim, situated in the Cape Nome Mining District, Alaska. The case was tried in the lower Court by the judge of said Court, sitting with a jury, but at the conclusion of the trial, on motion of said plaintiff (respondents), the jury were instructed by the Court to find for plaintiffs. From the judgment entered in pursuance of the verdict of the jury, writ of error was sued out by defendants (petitioners) to the Circuit Court of Appeals for the Ninth Circuit. The case was again heard upon said writ of error and judgment was rendered by said Circuit Court of Appeals affirming the judgment of the said District Court. A review of said judgment of affirmance is now sought upon the grounds (1) that the said judgment of the said Circuit Court of Appeals proceeds upon a proposition of law never before determined by this Court. (2) That the said judgment is in conflict with the doctrine laid down

by this Court in certain adjudicated cases. (3) That a question is decided, upon which there is a conflict between two decisions of the highest Courts of two States, and (4) That the said Circuit Court of Appeals exceeded its jurisdiction in enforcing the doctrine of "office found" in a possessory action between two litigants to which the United States was not a party, and in adding an additional penalty beyond the one expressed in the Statute itself.

The return of the writ of certiorari was filed in this Court January 4, 1910, and contains a full transcript of all the proceedings had in the case subsequent to the judgment rendered by the District Court therein, and also a bill of exceptions setting forth the evidence and pleadings upon which judgment in the first instance was rendered. The entire case is now before this Court, including the original judgment, and the lower Court's opinion thereon, the affirmance of said judgment with the opinion of the said Circuit Court of Appeals in support thereof. Petitioners are praying that the said judgment of the said Circuit Court of Appeals be set aside while respondents are asking that the said judgment be affirmed.

The Facts.

At the conclusion of the trial of the action in the District Court, plaintiffs moved the Court to instruct the jury to find for plaintiffs (respondents) upon specific grounds as follows:—

"First. That the testimony as now adduced before " the Court and to the jury shows that on the 1st day " of January, the land included within the Golden Bull " location was open and unappropriated public domain " of the United States and subject to location;

"Second. Because the defendants have not estab- " lished any defense to the plaintiff's complaint or have " not answered in any way the testimony submitted " by the plaintiff in the case.

" (Jury withdrawn by order of the Court.)

" Mr. REED (continuing). The testimony submitted " by the defendants shows that the discovery made " by Mr. J. Potter Whittren in the year 1901 as marked " upon the map by the witness himself, was at the point " No. 22; that on November 11th, 1903, the time when " he made the survey of the claim and drew in the " lines of the Bon Voyage claim it left the point where " a discovery was made outside and not within the " lines of the said Bon Voyage claim, and the defend- " ants themselves recognizing that it was necessary " that a discovery of gold be made within the lines of " the location as amended, put Mr. Whittren back on " the witness-stand, just before they closed their case " on Saturday evening, and he testified that on De- " cember 11th, 1903, he again went to the mining " claim in question and made a discovery at the point " designated as the prospect shaft and within the lines " of the said Bon Voyage claim.

"The testimony also shows that at the time of said " discovery of gold Mr. J. Potter Whittren was a

"Deputy Mineral Surveyor of the United States, and "therefore under the laws of the United States inca- "pacitated to make a mining location."

(Transcript p. 45.)

The Court granted the motion of plaintiffs and so instructed the jury. The effect of the granting of the motion of plaintiffs was to remove from the jury the necessity of deciding any controverted question of fact. So far as the issue now before this Court is concerned, we may assume that there is no disputed question of fact involved and the questions of law to be discussed arise from facts about which, we think, there can be no serious controversy. The facts are in substance as follows:—

On January 2, 1902, petitioner Whittren located the Bon Voyage claim. In February, 1903, he was appointed a Deputy Mineral Surveyor. On November 11, 1903, while he was such Surveyor, he went upon the Bon Voyage claim and surveyed it. Finding that the claim in accordance with the stakes as set by him in 1902, included more than the 20 acres permitted by law, he pulled in his northwest and southwest stakes so that the claim would be 1320 feet long by 660 feet wide. In drawing in the stakes, however, he left out of the claim altogether the discovery hole where he had discovered gold in 1902. Thereafter, on December 13, 1903, he discovered gold within the boundaries of the Bon Voyage as said boundaries were fixed by him on November 11th of the same year.

On January 1, 1904, respondent Schwarz located the Golden Bull claim, a portion, about eight acres, of which overlapped the Bon Voyage. This location was complete in every way, including the markings on the ground, the discovery of gold and the recording of the location notice. On March 23, 1904, Schwarz deeded a half interest in the claim to respondent Halla, and he also conveyed a quarter interest to respondent Hammer.

Whittren on September 24, 1905, deeded a half interest in the Bon Voyage to petitioner Eadie. On June 11, 1906, Whittren and Eadie leased the western 220 feet of the claim to petitioner Waskey and later Whittren and Eadie leased the eastern 440 feet of the claim to Waskey and Eadie. The lessees of the Bon Voyage developed a pay streak which was in the portion of the ground overlapped by the two locations of the Bon Voyage and the Golden Bull, so the question as to which location is valid and superior will be determinative of the rights which the various parties have either as owners or lessees in the pay streak. As the facts are practically admitted by all the parties to the controversy, no extended statement of the evidence would seem to be necessary and we shall now proceed to the discussion of the questions of law which have arisen in the case.

The Law.

I.

WHITTREN WAS A DEPUTY MINERAL SURVEYOR OF THE UNITED STATES AT THE TIME OF THE LOCATION OF THE BON VOYAGE AND AS SUCH WAS SUBJECT TO THE SPECIFIC PROHIBITION OF SECTION 452 OF THE REVISED STATUTES.

There is no dispute about the fact that during February, 1903, Whittren was appointed and duly qualified as a Deputy Mineral Surveyor. The first questions we should ask are (a) Who is a Deputy Mineral Surveyor? (b) How is he appointed? (c) What are his duties?

(a)

Answering our first question, we find that a Deputy Mineral Surveyor is a surveyor appointed by the Surveyor General of the United States. He is appointed to survey mining claims and before entering upon the duties of his office, he must give a bond for the faithful performance of the duties of his office in accordance with the regulations of the Land Department in force at the time of his appointment (Regulations of Land Department, General Mining Circular of December 18, 1903).

(b)

As many competent surveyors as shall apply for appointment shall be appointed under Section 2324, U. S. Revised Statutes, and especially shall one or more be appointed in each mining district for the conven-

ience of miners (supra Sections 92 and 115). Persons desiring the appointment should file applications with the Surveyor-General, who will furnish all necessary information (supra Section 116). And all appointments must be submitted to the Commissioner of the General Land Office for approval. The appointments may be revoked or suspended for cause and before final action is taken the matter must be submitted to the General Land Office for approval.

(c)

Mineral surveyors must correct errors due to their carelessness or suffer "suspension or revocation of his commission". They must keep accurate record of their surveys. They must make a verified return of surveys to the Surveyor General.

From reading the regulations of the Land Department applicable to Deputy Mineral Surveyors, we are impressed with the fact that they seem to be very important persons in the system by which the Government of the United States administers its public lands through the agency of the Land Department. The Surveyor General and his office are an integral part of the Land Office. Instead of deputies being sent out from the Surveyor General's office to make surveys of public lands for the greater convenience of miners and in order to save expenses, the Statute provides for the appointment by the Surveyor General of local deputies who are qualified to act as agents of

the government in the matter of the surveys of public lands. The deputies do not work in the Surveyor General's office at Washington, but they are in the field, prepared to make the surveys requested by the miners. They file their reports and surveys with the Surveyor General and their surveys, when properly verified, are accepted by the Land Department as official acts.

Section 452 of the Revised Statutes reads as follows:

> **"The officers, clerks and employees in the General Land Office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public lands, and any person who violates this section shall forthwith be removed from his office."**

If we search for a reason for the existence of such a Statute as this, the principle involved is applicable to a Deputy Mineral Surveyor, just as much as to a clerk in the General Land Office at Washington. In fact, we think there is more reason for prohibiting a Deputy Mineral Surveyor from acquiring public lands than a mere clerk who has access to records in the office. The surveyor acquires his information at first hand and could use it for his own profit before others knew the facts. Instead of assisting the Department in administering the public lands, selfish motives would be impelling him to acquisition of lands where there was a conflict of surveys, or excess of a claim over the amount allowed by law. The sound public policy of the statute cannot be questioned and the applica-

bility of the Statute to deputy mineral surveyors, based on the same public policy, seems to us obvious. However, we are not without precedents so far as the question is concerned.

The Land Department has construed the section as applicable to Deputy Mineral Surveyors in the following cases:

In re Herbert McMicken, 10 L. D. 97:

THE FACTS OF THE CASE.—

McMicken made timber land entry upon public land in the Territory of Washington and was a clerk in the office of the Surveyor General at the time of the act of entry.

THE LAW OF THE CASE.—

Quoting from page 99 of the opinion:

> "* * * that Section 452 of the Revised Statutes was intended to extend the disqualification to acquire public lands to the officers, clerks and employees in any of the branches or arms of the public service under the control and supervision of the commissioner in the discharge of his duties relating to the survey and sale of the public lands * * * officers, clerks and employees in the office of the Surveyor General fall clearly within the mischief contemplated by the Statute, and the reason of the law applies to them with equally as much force as to those in the Central Office at Washington. * * * It is ingeniously argued * * * that the prohibition to be found in Section 14 of said Act of 1836 only applied to officers whose salaries were 'therein provided for'; that clerks of the Surveyor General's office not being 'provided for' were not in-

tended to be included and that Section 452 of the Revised Statutes being a mere generalization of Section 14 of the original act ought not to be construed as an enlargement of the same so as to include classes not embraced in the original prohibition.

* * * "For the reasons here given, in addition to those before stated, I have no difficulty in affirming the former ruling that clerks in the office of the Surveyor General are clerks or employees in the office of the Commissioner of the General Land Office, in contemplation of the law, and therefore within the inhibition of Section 452 of the Revised Statutes."

We cite also the case of

Muller v. Coleman, 18 L. D. 394,

which expressly applies the Statute in question to a Deputy Surveyor and denies him the right of entry.

The case of *In re Neill*, 24 L. D. 393, follows, holding that the same doctrine is applicable to a Surveyor General.

In the case of *Floyd v. Montgomery*, 26 L. D. 122, a Deputy Surveyor was an applicant for a patent. He had not taken up the claim while Deputy Surveyor, but after his survey and before application for patent he became interested in it and was one of the seven applicants for patent. The Department ruled that he was disqualified by the Statute from acquiring title and struck his name out as one of the applicants.

In the cases of *Frank Maxwell*, 29 L. D. 76, and *Alfred Baltzell*, 29 L. D. 333, the same principle was

followed and deputy surveyors were held barred from making entry.

This brings us to the two cases of *Lavagnino v. Uhlig,* 71 Pac. 1046, and *Hand v. Cook,* 92 Pac. 3, the former of which cases was decided by the Supreme Court of Utah and the latter by the Supreme Court of Nevada.

It was earnestly contended by petitioners in their petition for writ of certiorari herein that there was a conflict of authority regarding the point under discussion between the Supreme Court of Utah and the Supreme Court of Nevada, and that the case at bar therefore presented one of the cases wherein this Court issues writ of certiorari, that is "the necessity " of avoiding conflict between two or more Courts of " Appeal or between Courts of Appeal and the Courts " of a State".

Forsythe v. Hammer, 166 U. S. 514.

It therefore becomes necessary to analyze these two cases somewhat rigidly.

Lavagnino v. Uhlig et al., Supreme Court of Utah, decided Sept. 4, 1903, 71 Pac. Reporter 1046, 99 Am. Stat. Rep. 808.

THE FACTS OF THE CASE.—

One J. Fewsom Smith Jr., while a Deputy United States Mineral Surveyor, located a claim called the "Yes You Do" and afterwards transferred the claim to Lavagnino, who was the plaintiff in the case.

At the trial the plaintiff offered in evidence a certified copy of location notice of the "Yes You Do" and the defendants objected thereto on the ground that "it "appears that the said mining claim was not located "by a person, who had the power under the Act of "Congress to locate mineral ground, it appearing from "the testimony of the witness that he was at the "time mentioned * * * a Deputy United States "Mineral Surveyor for Utah and therefore incompe-"tent to make locations. * * * The trial Court "excluded said notice on the ground that J. Fewson "Smith Jr., locator of claim, was prohibited from "making the location of a lode mining claim and "therefore had not the qualifications to initiate any "title by any act that he did with reference to locat-"ing the 'Yes You Do' mining claim."

THE LAW.—

In sustaining the order of the Court refusing to admit in evidence the location notice, the Supreme Court of Utah first cites Section 452 and Section 2319 of the Revised Statutes in full, and then says:

> "* * * it was the intention of Congress to prohibit on the ground of public policy, officers, clerks and employees in the General Land Office from acquiring directly or indirectly an interest in the purchase from the Government of any of the public land of the United States. * * *
>
> "We think that the section in question includes mineral surveyors and prohibits them, as held by the Land Department from entering any of the public lands while they are such deputies, and

also from directly or indirectly acquiring any interest in the purchase from the Government of the same.

"It follows that J. Fewson Smith Jr., while he was a Deputy Mineral Surveyor, was prohibited by said section from entering a mining claim or from directly or indirectly acquiring any right or interest in the purchase from the Government of such a claim.

"He was also prohibited at that time from doing any of the acts upon the performance of which, under the provisions of the Mining Law of 1872, the right of making an entry or purchase from the Government depends and that his location of the 'Yes You Do' was therefore void and Lavagnino acquired no rights under the deed from him to the same."

Hand et al. v. Cook et al., Supreme Court of Nevada, decided Oct. 17, 1907, 92 Pac. Rep. 3.

On January 1, 1904, defendant Cook, who was a Deputy U. S. Mineral Surveyor located a claim and called it the "Yuba East" claim.

It was conceded that Cook had made a valid location and that the claim was his property unless he was disqualified from making a valid location, because of the fact that he was Deputy U. S. Mineral Surveyor.

After a review of the various acts bearing on the subject of disqualification of officers and employees of the land department to purchase public lands of the United States Government and after a review of the various decisions of the United States Land Office bearing on the matter, the learned Judge Norcross, who wrote the opinion, says:—

"A careful examination of the points presented in this case convinces us that the rulings of the Land Department, in so far as they hold or infer that a deputy mineral surveyor is disqualified to locate a mining claim because of the provisions of Revised Statutes, Section 452, are erroneous. * * * for the position we think is well taken that a deputy mineral surveyor is not an officer, clerk or employee in the General Land Office * * *"

This opinion was concurred in by Judge Sweeny of the same Court, but Judge Talbot wrote a strong dissenting opinion in which he says, at page 11:

"In the conclusion reached by my associates that Cook was not disqualified as a United States Deputy Mineral Surveyor from making locations, I am unable to agree.

"The language in Section 452 * * * plainly contains a prohibition against officers, clerks and employees in the Land Office purchasing or becoming interested, directly or indirectly, in the purchase of the public lands, and, in addition, a penalty by removal from office is added. * * * The language of the act being plain, it ought not to be varied by reference to any former acts which it supersedes and repeals.

"As the location of mining claims is the first step toward the acquiring and purchasing of them from the Government, and the officers, clerks and employees in the land office are prohibited from purchasing or becoming interested in the purchase of the public lands, it follows that they ought to be considered as prohibited from making locations. Full force and fair interpretation should be given to the words used.

"The holding of the majority of the Court that the penalty clause of the Statute only is effective, and that the word 'prohibit' which it contains

does not prohibit is equivalent to the elimination and judicial repeal of the prohibition enacted by Congress.

* * * "If there be any doubt as to whether his designation in the Statute as a deputy, and the other provisions do not bring him within the letter of the law, he comes within its spirit and if the letter kills the spirit ought to control and give life to the Statute.

"When we look to the object and purpose of the restriction by Congress against the acquiring of public lands by the officers, clerks and employees in the Land Office, stronger reasons are apparent for prohibiting the deputy surveyors from locating mining claims than for placing such restraint on other officers. * * * In my opinion the past rulings and present practice as made by the Secretary of the Interior, and the Commissioner of the General Land Office and the opinion of the Supreme Court of Utah in the Uhlig case and the decision of the District Court that Deputy Mineral Surveyors are barred by the Act of Congress from making mining locations, ought to be approved and followed and the judgment, from which the appeal is taken, ought to be affirmed."

We have cited at ength from the dissenting opinion in the above case in order to show first, that the Court was divided, and second, that the dissenting opinion is supported by sound reason.

In commenting on the above case, Costigan in his work on Mining Law at page 170, says,

"While the Court seems to have been in error in saying that Deputy United States Mineral Surveyors are not covered by the above mentioned Statute (Sec. 452 Rev. Statutes), nobody but the Government could possibly object to a location

by a Deputy Mineral Surveyor and the Court was therefore right in its decision, but erred in the reason given for it.

"The dissenting judge in the case being discussed, seems right in adhering 'to the broader construction that clerks, officers and employees in the General Land Office include officers, clerks and employees in the offices of the Surveyors General or the local land offices, which are merely arms or branches of the General Land Office', but he also erred in regarding the location as absolutely void."

The same author, in speaking of *Lavagnino v. Uhlig*, supra, says:

"This is but a State decision, for the United States Supreme Court, when the case came before it, avoided the point by basing its decision on the ground that the land was not open to location."

Costigan on Mining Law, page 170;

Lavagnino v. Uhlig, 198 U. S. 443.

We submit that so far as these two cases are concerned, there is a substantial agreement on the question that a Deputy U. S. Mineral Surveyor comes within the restrictive prohibition of Section 452 of the Revised Statutes.

II.

A DEPUTY MINERAL SURVEYOR UNDER SECTION 452 REVISED STATUTES IS PROHIBITED FROM ACQUIRING BY PURCHASE DIRECTLY OR INDIRECTLY THE PUBLIC LANDS OF THE UNITED STATES, AND HENCE HE CANNOT PERFORM VALID ACTS OF LOCATION OF A MINING CLAIM.

The facts in the case at bar upon which the above proposition of law is predicated are not disputed but

there may be a difference of opinion as to just what construction should be placed on the facts. When Whittren surveyed his claim on November 11, 1903, he voluntarily and intentionally excluded the part of the ground upon which he had discovered gold. It was no mere accident on his part, but he knew where his discovery hole was, and being a surveyor he was well qualified to know that the replacement of the northwest and southwest stakes threw his north and west lines inside the discovery point. He had the choice of cutting off the excess of his claim over twenty acres from any part of the claim which he might wish. He made the choice and deliberately decided to exclude the ground which was known by discovery to contain gold.

The law which makes the discovery of gold one of the requisites necessary for the acquiring of a possessory title to public lands for mining purposes is a good one. It was never intended that possession of public lands might be retained under an alleged mining location where the land was not in fact mineral land. The discovery of gold is an important step, if indeed it is not the most important step in the entire proceeding. It is true that there need not be a discovery of gold upon every square foot of the claim. It is also true that a discovery off the claim will not avail the locator. Twenty acres has been determined by the Government as the size of a claim. Whether or not the land to be located is mineral land, is the first question. A discovery of gold seems to settle the matter.

If Whittren could make his discovery twenty feet outside the lines of his claim as determined by himself, serve as a discovery on the claim itself, then this doctrine of vicarious gold discovery would render the plain terms of the statute of no effect. It is obvious that Whittren did not consider the discovery of 1902 sufficient for completing the location of the Bon Voyage with its corrected lines, because he proceeded to make a new discovery within the proper lines of the claim, December 13, 1903.

It has been argued that the excess of a claim over the twenty acres cannot be taken from a locator until he has been given an opportunity to correct his lines to conform to the law. We concede that a location made in good faith and otherwise conformable to law is not rendered wholly void because of an excess, but only the excess portion is void and the locator is at liberty to select the portion which he wishes to reject.

Zimmerman v. Funchion et al., 161 Fed. 859;
Price v. McIntosh, 121 Fed. 716.

It has also been argued that a locator may make his discovery of gold after he has staked the claim; that the order in which the events take place is not material provided no bona fide intervening rights accrue.

We concede these propositions of law and applying them to the facts in the case at bar, the discovery of gold by Whittren in December, 1903, would have completed the location of the Bon Voyage begun the same year before the Schwarz location of the Golden Bull,

if Whittren had had the capacity to make a location of public land at that time.

(a)

Marking of Boundaries on the Ground and Discovery of Gold are Two Acts Necessary to a Valid Mining Location.

In some places also recording of location notice is a third step which must be taken. As already stated, the order in which these acts is performed is immaterial, provided that no such lapse of time occurs between the acts as brings in intervening rights. Both of the acts of marking boundaries and discovering gold are essential. The location rests upon the discovery as well as upon the marking of the boundaries. If a miner marks his boundaries and then fails to make a discovery *within the limits of the boundaries* he has no title to the ground. If he makes a discovery of gold and fails to mark boundaries on the surface of the ground including the discovery, he fails to get title to the ground. The two things must converge, as it were, on the same ground, though not necessarily at the same time. A discovery of gold at a prior time might be availed of by a locator if no intervening rights interfere, but a discovery of gold at a different place, obviously outside the boundaries of the claim actually decided upon by the locator himself, cannot be used in locating the claim. This Court has said in *Gwillim v. Donnellan*, 115 U. S. 45, 50: The discovery

> "must lie within the limits of the location which is made by reason of it. If the title to the discovery fails, so must the location which rests upon it".

(b)

Locating a Mining Claim is "Purchasing or Becoming Interested in the Purchase of any of the Public Lands" Within the Meaning of the Statute.

The word "purchase" has acquired a technical meaning in law—that is, "to purchase" is any method of acquiring real property other than by descent.

> "The acquisition of real estate by any means whatever, except descent."
>
> *Farrington v. Wilson,* 29 Wis. 383, 392.

> "* * * In its technical and larger sense in case of land, the act of obtaining or acquiring title to lands and tenements by money, deed, gift or any other means except by descent."
>
> *32 Cyc.,* p. 1265.

We do not see how the word purchase, as used in the Statute, can have any other than the broadest kind of a meaning. It so happens also that the technical meaning of the word gives it a much larger scope than the so-called common use as signifying acquisition by payment of money. We are fortunate indeed in having the technical use of the word subserve public policy as too often that which is technical is against public policy, while here the whole policy of the Statute indicates that the intention is to prohibit officers and employees of the Land Department from acquiring public lands in any way with the exception of the involuntary method of descent.

(c)

When Whittren Drew in His Lines and Excluded His Discovery Point He Abandoned His Location of January, 1902, and the Ground was Open to Location by Schwarz if the Attempted Relocation of 1903 by Whittren was Invalid.

As we have already stated, Whittren was a surveyor; knew where his discovery of 1902 had been made; and deliberately and intentionally excluded it from the Bon Voyage. If any other fact is needed to show a clear intention on the part of Whittren to abandon his location of 1902, it is found in the circumstance that after his survey and resetting of the northwest and southwest stakes, he considered it necessary to make a new discovery of gold *within* his boundaries.

What constitutes abandonment of a location? In the decision of the Circuit Court of Appeals in the case at bar, Judge Ross says:—

"When, therefore, Whittren in November, 1903, left " out of his boundaries the only place upon which he " had then made a discovery of mineral, he abandoned " one of the essential elements of his location. It is " true that the evidence tended to show that he still " maintained his claim to the ground included within " his readjusted boundaries, which were marked as " required by the Statute and embraced only the statu- " tory area, but within those boundaries he had not " then made a discovery of mineral."

Trans. p. 64.

In the case of *Farrell v. Lockhart*, 210 U. S. 142, it appears that there were three locations covering the ground.

The first location under the name of South Mountain lapsed because of no assessment work thereon December 21, 1901. The second location called the Cliff was initiated August 1, 1901, which was before the time had expired for doing assessment work under the first location. The third location called the Divide was initiated January 2, 1903. The decision of the Supreme Court of Utah was in favor of the third location and against the second location (the first location was not represented in the litigation) on the ground that the land was not open and subject to location by the second locator because the time for doing the assessment work under the first location had not lapsed. In reversing the decision of the Supreme Court of Utah, this Court, speaking through Justice White, says:—

> "It does not therefore include the conception that the mere fact that a senior location had been made, and that the statutory period for performing the annual labor had not expired when the second location was made, would conclusively establish that the location was a valid and subsisting location, preventing the initiation of rights in the ground by another claimant, if at the time of such second location there had been an actual abandonment of the original senior location. We say this because—taking into view *Belk v. Meagher, Lavagnino v. Uhlig* and *Brown v. Gurney*—we are of the opinion and so hold, that ground embraced in a mining location may become a part of the public domain so as to be subject to another location before the expiration of the statutory period for performing annual labor if at the time when the second location was made, there had been an actual abandonment of the claim by the first locator.

"In *Black v. Elkhorn Mining Company*, 163 U. S. 445, summing up as to the character of the right, which is granted by the United States to a mining locator, after observing that no written instrument is necessary to create the right, and that it may be forfeited by the failure of the locator to do the necessary amount of work, it was said (p. 450)

"'(3) His interest in the claim may also be forfeited by his abandonment, with an intention to renounce his right of possession. It cannot be doubted that an actual abandonment of possession by a locator of a mining claim, such as would work an abandonment of any other easement, would terminate all the right of possession which the locator then had.

"'An easement in real estate may be abandoned without any writing to that effect, and by any act evincing an intention to give up and renounce the same. *Snell v. Levitt*, 110 N. Y. 595, and cases cited at p. 603 of the opinion of Earl, J.; *White v. Manhattan Railway Co.*, 139 N. Y. 19. If the locator remained in possession and failed to do the work provided for by Statute, his interest would terminate, and it appears to be equally plain that if he actually abandoned the possession, giving up all claim to it, and left the land, that all the right provided by the Statute would terminate under such circumstances'."

The case of *Lavagnino v. Uhlig*, 198 U. S. 443, also presents a situation where the first locator was held to have abandoned his location in favor of a junior locator.

Thus reasoning by analogy if we consider Whittren in 1903 as a different locator from Whittren in 1902, then the Whittren of 1903 attempted to locate an abandoned or forfeited claim, and might have done so if

he had not been suffering under the disqualification. But that the Whittren of 1903 did intend to abandon his location of 1902 and that he did carry out that intention by the act of throwing out his discovery point, is clear from the evidence.

Syllabus:

"A location based upon a discovery within the limits of another existing and valid location is void."

Tuolumne Consolidated Mg. Co. v. A. C. Maier, 134 Cal. 583.

(d)

A Person Specifically Prohibited by a Statute from Acquiring Public Lands Cannot Initiate Title Thereto.

It has been argued with force and ingenuity (1) that despite the words of the Statute, the title to public lands initiated by a Land Office employee is valid until and unless assailed by the Government in a direct proceeding where "office found" is an issue; (2) that the disqualification of employment in the General Land Office is like the disqualification of alienage and that reasoning from analogy, the title initiated by the employee in the Land Office is not void, but voidable only at the instance of the Government; (3) that the title to public lands acquired by an employee in the Land Office may be valid in the hands of innocent purchasers, despite the fact that the title might be invalidated in the hands of said employee at the suit of the Government; (4) that the title of an employee in the Land Office to public lands may be transmitted to others be-

cause the reasoning of the National Bank Indian reservation and alienage cases sustains the conclusion that such title is voidable and not void; and finally (5) that the Statute under consideration prescribes a penalty, to-wit, dismissal from office, and that invalidation of the title to public lands acquired by an employee in the Land Office would be adding an additional penalty to the Statute which the Court cannot do.

We are anticipating the arguments of petitioners, in the hope that it will not be necessary for respondents to file another brief in reply after petitioners' brief shall have been filed. The case has been already elaborately briefed by the very able counsel for petitioners and we shall take the liberty of replying to the arguments presented.

As was said by the learned judge who wrote the opinion in the United States Circuit Court of Appeals, "Nor do we see that there is any much clearer way to "prohibit an act than to say expressly that it is pro- "hibited. That Congress did in the section in ques- "tion" (Trans. p. 65).

The very act of locating the public lands is prohibited. All the specific steps which together make up the location of the claim are prohibited. Everything done in order to acquire the right of possession of the ground for the purpose of taking out the minerals therein, is prohibited because all these things linked together make up the chain of purchase. There never was a purchase from the Government by Whittren because he could not do the things, directly or indirectly,

necessary to be done to initiate the proceedings ending in a purchase. The disqualification of Whittren was primal, inherent and perpetual—such is the obvious public policy which is breathed from every line and word of the Statute. The public lands were to be held sacred and inviolable, from the touch of Government employees. The burden and embarrassment of public office should not be removed by judicial interpretation. The powerful voice of the law should encourage those whose care of the public lands is a sacred duty.

1.

Did Whittren Acquire Such a Title that He Could Hold the Claim Against the Whole World Except the Government of the United States?

The case of *Prosser v. Finn*, 208 U. S. 67, seems to answer this question.

THE FACTS OF THE CASE.—

On the 18th day of October, 1882, Prosser made a timber culture entry at the proper land office in Washington for the lands in dispute and thereafter duly planted trees, and by cultivation in good faith, improved the lands at great labor and expense.

His entry was completed in all respects pursuant to the Statute. On October 28, 1889, one Walker filed against Prosser's entry an anffidavit of contest, setting forth amongst other things that Prosser at the time of entry was an acting United States timber inspector and that as such inspector he was prohibited by law from making his entry.

The local land office sustained Walker's contest, holding that bad faith could not be imputed to the entryman and stating that a great hardship had been done the contestee in the case, but holding that the Statute made it illegal for Prosser to make his entry, because at the time he was a special agent of the Land Office.

Walker was permitted to enter the lands, he having at the time full knowledge. Subsequently a patent was issued to Finn, present defendant in error.

THE LAW OF THE CASE.—

The Supreme Court of the United States, through Mr. Justice Harlan, in commenting upon these facts, says:

> "This case depends upon the construction to be given to Sec. 452, Revised Statutes. * * * The difficulty in the way of any relief being granted to plaintiff arises from the Statute prohibiting any officer, Clerk or employee in the General Land Office directly or indirectly from purchasing or becoming interested in the purchase of any of the public lands. That a special agent of the General Land Office is an employee in that office is, we think, too clear to admit of serious doubt. Referring to the Timber Culture Statute, Secretary Smith well said:
>
> " 'When the object of the Act is considered, it will be seen that it applies with special force to such parties as the defendant in the cause at issue. As a special agent of the Commissioner of the General Land Office, he was in a position peculiarly adapted to secure such knowledge, the use of which it was the intention of the Act to prevent * * *.'

> * * * "They are in every substantial sense employees in the General Land Office. They are none the less so, even if it be true as suggested by the learned counsel for plaintiff that they have nothing to do with the survey and sale of the public lands or with the investigation of applications for patents or with hearings before registers and receivers. Being employees in the General Land Office it is not for the Court, in defiance of the explicit words of the Statute to exempt them from its prohibition."

We call particular attention to the fact that this case arose as an action between Prosser and Finn and that the U. S. Government was not a party to the litigation, although the Commissioner of the General Land Office had previously decided against Prosser.

There is no indication that the decision of the U. S. Government was pleaded as res adjudicata on the question of the validity of the Prosser entry, and in fact the entire question was examined anew and the decision of the Land Office upheld upon that point.

The only possible ground upon which the decision could be based, in view of the very great equities existing in favor of Prosser, was that his original entry was vitiated by reason of the fact that he was disqualified at the time from making any entry.

In concluding this branch of the discussion we quote from the note in *Vol. 139, American State Reports,* at page 155:

> "It is because of the facts stated in the above cited case that there is at times an apparent conflict in the decisions of the Courts in cases involving the question of discovery. An examination of

the cases on this subject will show a growing tendency of the Courts to attach considerable importance to the decisions of the Interior Department upon matters affecting the disposition of the public lands. And with the growing responsibility of that department in rendering decisions which are looked to as carrying authority, there is more of a disposition by it to have a harmonious system of decisions which establish principles which are in accord with the spirit of the mineral laws and the practical needs of the mineral bearing States."

(2.)

The Alienage Cases Are Not in Point.

The Alienage Cases were decided under a statute which reads as follows:

> "All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."
>
> *Costigan on Mining Law*, p. 167.

It will be observed that citizens may locate mineral lands and also those who have filed declaration of intention to become citizens. Also it has been held that if an alien after an attempted location takes out his

first naturalization papers, his location becomes valid *ab initio.*

Costigan on Mining Law, p. 168;
Lone Jack Mining Co., v. Megginsen, 82 Fed. 89.

By the terms of the Statute itself the lack of qualification of an alien locator of mining ground may be removed by filing first papers. By judicial interpretation of the Statute we find the lack of qualification of an alien is such that the act of locating a claim is not vitiated, but the absence of qualification may be subsequently supplied.

Under the Statute in the case at bar it is not a question of lack of qualification but of a positive disqualification. The alien is wanting in a qualification which may later be supplied. The employee in the Land Office has a positive disqualification which incapacitates him from performing the act of locating public lands. It is a sound public policy which encourages aliens in becoming citizens. In interpreting the Statute aliens are encouraged to become citizens so that they may acquire the public lands of the United States.

In some of the earlier decisions it was held that a location by an alien was absolutely void and that the land located by an alien was open to location immediately after the attempted location (*Bohanon v. Howe,* 2 Idaho 417; *Martins Mining Law and Land Office Procedure,* Section 97), but this rule has been entirely relaxed by later decisions. We can understand how a sound public policy would suggest a liberal interpreta-

tion of the Statute in favor of aliens, while the same public policy would demand a rigid interpretation of Section 452 against an employee in the Land Office.

(3.)

The Suggestion of Protection to an Alleged Innocent Purchaser from an Employee of the Land Office Would Render the Statute Impotent to Protect Bona Fide Locators of Public Lands Against the Machinations of Officers and Employees of the Land Office.

After Whittren had purchased the claim at bar by completing his alleged location, he deeded to petitioner Eadie a half interest September 24, 1905. The record does not seem to show whether or not Eadie knew that Whittren was a Deputy Mineral Surveyor at the time the alleged location of the claim was consummated. Passing by the question as to whether the burden is not cast upon the shoulders of petitioners of showing from the record that Eadie was an innocent purchaser, we do not see how the question of "innocent purchaser" can arise.

Whittren cannot transmit to a purchaser a title possessory, or otherwise, which he never had. Whittren never had a title subject to a defeasance. He never had an inchoate title (such as an alien locator has). He was never even potentially the owner of the claim. He never had any kind of title, void, voidable, or otherwise.

There is no evidence that Whittren acted in bad faith, but for the purpose of illustrating the argument,

suppose that he had fenced in some public land without regard to any statute whatever. Does his deed transmit any title? Does the alleged purchaser of the fenced in property acquire such a title that the Government must intervene and have the "title" declared void? Whittren's disqualification was such that his hand was stayed and in law he did nothing. He located no land. His deed to Eadie was an eviscerated paper devoid of substance. His deed passed nothing because he had nothing.

A thief steals property and sells it to an innocent purchaser. Is the sale void or voidable? Must the owner have the sale declared void in order to recover his property? We answer that the sale is neither void nor voidable. There is no sale at all. There is the form of a sale without the substance. No title whatever passes to the alleged purchaser. The act of stealing gives the thief no title. He takes possession of the property just as any vendee would but from the beginning he is disqualified and the bare possession does not give even color of title.

Whittren took possession of the claim and did other acts just like the acts of a qualified locator. He could not locate public lands, however, under any circumstances while he continued as an employee of the Land Office. Therefore, he could not become the channel for the transmission of title from the Government to anyone, innocent purchaser, or otherwise.

(4.)

The National Bank Cases, Indian Reservation Cases, Foreign Corporation Cases and Ultra Vires Cases, Proceed upon a Different Principle.

(a) *The National Bank cases:*

The Statute governing National Banks reads in part as follows:

> "A National Banking Association may purchase, hold, and convey real estate for the following purposes, and for no others * * *."

Under this Statute it was held in the case of *Fritts v. Palmer,* 132 U. S. 282, that if a National Bank took a mortgage contrary to the terms of the Statute, the mortgage was not void, but voidable only in a direct suit brought for that purpose. It will be observed that this is not a case where the National Bank is laboring under a total disqualification in respect of mortgages under certain regulations. The National Bank has the *capacity* to *take mortgages* conformable to certain conditions. The Statute does not *prohibit* the National Bank from taking any mortgages at all. We think that a broad distinction can be drawn between a total lack of qualification to perform an act and a restriction on performing the act in any other than the prescribed way. While Whittren was a Deputy Mineral Surveyor, he could not acquire by purchase any of the public lands of the United States in any way. The National Bank could hold mortgages subject to certain specified restrictions. Whether or

not the restrictions are operative in any particular case, was and is a matter for investigation.

(b) *Indian Reservation cases:*

Under an Act of Congress throwing an Indian Reservation open to location, a time was specified on and after which the lands should be considered open. This restriction as to time was also covered by the President's proclamation as follows:

> "Warning is hereby again expressly given that no person entering upon and occupying said lands before said hour * * * of April 22, 1889 * * * will ever be permitted to enter any of said lands or acquire any rights thereto * * *."

We take the above instance as being somewhat typical. In the case of *McMichael v. Murphy*, 197 U. S. 304, it was held that an entry made by a person otherwise qualified, but contrary to the statute and proclamation was prima facie valid.

We think the distinction between the above line of cases and the one at bar is an obvious one. In the above case the entryman was qualified but did not make his entry strictly according to the Statute and the proclamation. The entry was irregular and could possibly have been cancelled on proof of the irregularity, but it was valid until the irregularity was shown. There was an entry in fact. In the case at bar there was no location in fact because Whittren could not make a location. It was not a case of a location defectively made, the defect not appearing, but it was a case of no location at all because Whittren's hand was

stayed. All that he did was idle. There never was a location made by him of any kind or character while he was an employee of the Land Office.

(c) *Foreign Corporation cases:*

Several states have laws forbidding foreign corporations from doing business unless and until they have complied with the laws of the states as to registration, payment of fees, etc. It has been held in several cases that where a foreign corporation operating within a state having such a law and contrary thereto, takes property by deed or mortgage, such deed or mortgage is not void and collateral attack cannot be made thereon by a private person. Here again we must observe that the foreign corporation has the capacity to purchase and hold real estate. In Colorado the Statute provided that no foreign corporation should purchase or hold real estate in the State *except as provided by the Colorado law.* Whether or not there had been a compliance with the Colorado law, was the subject for investigation. There is no attempted total disqualification of a foreign corporation in the matter of holding real estate. The language used by the Supreme Court of the United States in the Colorado case of *Fritts v. Palmer,* 132 U. S. 282, is significant.

> "The question whether a corporation *having capacity to purchase and hold real estate for certain defined purposes* or in certain quantities has taken title to real estate for purposes not authorized by law, or in excess of the quantity permitted by its charter, concerns only the State within whose limits the property is situated. It cannot be

raised collaterally by private persons unless there is something in the statute expressly or by necessary implication authorizing them to do so."
(Italics ours.)

Whittren did not *have the capacity* to locate a claim while he was a Deputy Mineral Surveyor. It is not a case of power defectively or irregularly exercised, but rather a question of total lack of power.

We suggest the analogy of the well known case of a Court's total lack of jurisdiction. The judgment of such a Court is no judgment at all—it is a mere nullity and can be ignored by the whole world. When however jurisdiction exists in a Court but there is a defective or irregular exercise of it, the judgment has verity unless assailed by *interested parties* in a direct attack by appeal. In the one case the Court is without power to make any judgment whatever. There is a total incapacity. Every act done, including the judgment, is a mere form without substance. In the other case, the power and capacity are present. The acts done, including the judgment, stand until the irregularity is established.

(d) *Ultra Vires Acts of Corporations:*

The reasoning which we have used under the previous head (c) of this brief, is a complete answer to the suggestion that there is an analogy between the so-called ultra vires cases and the one at bar. The fact that a corporation may perform some act which is ultra vires, presupposes that it has the capacity to perform the act in another way or under other circum-

stances. There was no way by which Whittren could purchase public lands of the United States while he was a Deputy Mineral Surveyor. His incapacity was total and unqualified. No circumstances can be conceived of under which a Deputy Mineral Surveyor could acquire by purchase the public lands. The incapacity which the law places on him finds ample justification in a wise public policy. If we complain that the law treats a Deputy Mineral Surveyor worse than an alien, let us be comforted with the thought, that the employees in the Land Office are reminded that after all public office is a public trust, demanding sacrifices as well as giving emoluments.

(5)

Since Employees in the Land Office are Disqualified from Locating Public Lands, it Cannot be Said that there is any Penalty Involved in Treating as Void any Attempted Location.

The penalty provided by Statute for attempting to locate lands is dismissal from office, and it is the only penalty. If a thief steals goods, the penalty visited upon him is imprisonment. Is it any penalty to deprive him also of the goods which he holds without title thereto? Has anyone ever contended that it is double punishment to put a thief in jail and also deprive him of the goods which the law prohibits him from taking? The Statute does not prescribe a penalty for thieving and also set forth that the title to the goods taken is void. The thief never had title of any kind or character. We realize that the analogy may not be a perfect one and we hasten to say also that in no

sense can Whittren be classed as one who has attempted to steal the public lands, but we desire to make it clear that there is no penalty involved in declaring void a title never in fact acquired. The fundamental error in the argument that a decision for respondents herein visits upon Whittren a double penalty, lies in the erroneous assumption that Whittren is deprived of something which he had. The fact is, however, that Whittren never had a claim because he could not perform the acts of location necessary to an appropriation of the public lands. To deprive him, therefore, of that which he never had is no penalty.

What a farce the law would be if such a construction were put on Section 452, supra, that an employee in the Land Office could use his information in acquiring choice pieces of the public lands, transfer the same to third persons, and then resign his office! If no patent were applied for the Government would not be called directly into any controversy concerning the land. Innocent purchasers might appear as grantees. The net result of the impotency of the law under the construction claimed by petitioners would be, that employees in the Land Office could secure the public lands and their titles would be untainted, provided, they paid the penalty of being removed from their positions. The Government could punish the offenders but let their acts of offense stand approved. The men who take improperly the public lands are penalized under this view of the Statute, but the lands taken are left in their possession. Such a result as this should not

be found in the interpretation of the Act, unless we are convinced that no other construction could have been intended by Congress. Where the language is plain and the strongest word possible "prohibited" is used, we submit that there should be no doubt as to the policy of the statute and that policy should not be rendered abortive by judicial construction.

Conclusion.

It has been suggested that the record herein presents a hard case, in that Whittren was deprived of his location by another locator. Petitioners have laid much emphasis on the so-called equities existing in their favor. It seems to be a matter so surprising as to excite comment when respondents suggest that the letter and the spirit of the law must be obeyed regardless of the consequences to particular litigants. Commencing with the passage of the first Act on this subject April 25, 1812, and down to the passage of Section 452, Revised Statutes, we find a clearly expressed policy set forth to the effect, that employees in the Land Office shall not directly or indirectly acquire title by purchase to the public lands. Are we called upon to defend a policy so full of the spirit of good government, or shall we break the policy down by judicial interpretation and indicate to those who administer the public lands, that spoliation is approved though the despoiler may be condemned? Shall those whose duties to the Government require them to conserve the public

lands be schooled in the belief that no act of theirs shall advantage them in any attempt whatever to gain such lands, or shall the hope of reward be held out to them, if they do the things prohibited by the plain letter of the Statute?

The Deputy Mineral Surveyor should not acquire a special advantage over all his fellow citizens, by reason of his office. There should be no special advantages to employees of the Land Office in the matter of the public lands which are open to all citizens. We must remove even the suspicion of a special advantage by placing this important question of public policy upon a sound legal foundation. Let it be known to all citizens that those who administer the public lands from the official head of the Land Office in Washington to the most insignificant office employee in a local district, shall not touch the property entrusted to them!

We most respectfully submit that at a time when the awakening moral conscience of the people against betrayals of public trust and unfaithfulness in fiduciary positions has been making such headway in suppressing frauds and protecting the equality of all citizens before the law, irrespective of official station, position, means or occupation, the established practice of the Interior Department and the rulings of Courts so far as we have hitherto gone, should not be reversed by going back to a technical and narrow construction of the Statute which will destroy forever the effectiveness of its prohibitions. We hope that the decision herein

will stand forever as a warning to all who find comfort in an interpretation of a plain Statute which robs it of all power to prevent the inhibited act.

Respectfully submitted,

ALBERT H. ELLIOT,
Attorney for Respondents.

GEORGE W. REA,
Of Counsel.

Due service and receipt of a copy of the within is hereby admitted

*this*_____*day of November, 1911.*

_____

Attorney for Petitioners.